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Supreme Court, U.S.
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No.

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**IN THE**

**SUPREME COURT OF THE UNITED STATES**

**James E. Loskill,**
**Petitioner**

**v.**

**Barnett Banks, Inc. Severance Pay Plan, Employee Benefits Committee of the Barnett Banks, Inc. Severance Pay Plan, NationsBank Corporation Corporate Benefits Committee, and NationsBank Benefits Appeal Committee,**
**Respondents**

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

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# PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED FOR REVIEW

Does the requirement that a participant establish bad faith, active concealment, or detrimental reliance before invalidating an amendment to an ERISA welfare benefit plan, which was adopted in violation of the amendment procedures required by the plan, directly conflict with the plain language statutory requirements of section 402(b)(3) of ERISA, as explained by the Court in *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 85 (1995) and *Inter-Modal Rail Employees Ass'n v. Atchison, Topeka and Santa Fe Ry. Co.*, 520 U.S. 510, 515-16 (1997)?

## PARTIES TO THE PROCEEDING

The petitioner is James E. Loskill.

The respondents are Barnett Banks, Inc. Severance Pay Plan, Employee Benefits Committee of the Barnett Banks, Inc. Severance Pay Plan, NationsBank Corporation Corporate Benefits Committee, and NationsBank Benefits Appeal Committee. NationsBank Corporation through merger and name changes is now known as Bank of America Corporation, which is a publicly traded corporation that is a parent to numerous subsidiaries, some or all of which are wholly owned.

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## OPINIONS BELOW

On April 25, 2002, the United States Court of Appeals for the Eleventh Circuit reversed the grant of summary judgment in favor of James E. Loskill ("Loskill") by the United States District Court for the Middle District of Florida, Jacksonville Division, and remanded for further proceedings. A copy of the published opinion of the Eleventh Circuit (App. A), *Loskill v. Barnett Banks, Inc. Severance Pay Plan*, 289 F.3d 734 (11th Cir. 2002), is contained in the Appendix. On June 19, 2002, the Eleventh Circuit denied Loskill's petitions for en banc and panel rehearing. Copies of the denials of rehearing of the Eleventh Circuit (App. C) are contained in the Appendix.

On June 28, 2000, the United States District Court for the Middle District of Florida in an unpublished order granted summary judgment in Loskill's favor and directed entry of judgment in his favor. A copy of the summary judgment order (App. B) is contained in the Appendix. Subsequently, on March 27, 2001, the United States District Court for the Middle District of Florida entered an unpublished order granting fees, prejudgment interest, and costs in Loskill's favor and directed entry of a final judgment in his favor.

## STATEMENT OF JURISDICTIONAL GROUNDS

This Court has jurisdiction under section 1254(1) of Title 28 of the United States Code, 28 U.S.C. § 1254(1), to review by certiorari the opinion of the United States Court of Appeals for the Eleventh Circuit rendered on June 19, 2002.

## STATUTORY PROVISION

Section 402(b)(3) of the Employment Retirement Income Security Act of 1974 requires every ERISA employee benefit plan to have a coherent written amendment procedure, including identifying those persons who have authority to amend the plan. Section 402(b)(3) of ERISA provides:

> (b) requisite features of plan
>
> Every employee benefit plan shall—
>
> (3) provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan,

29 U.S.C. § 1102(b)(3).

## STATEMENT OF THE CASE

On April 25, 2002, Judge Wilson and Judge Fay of the United States Court of Appeals for the Eleventh Circuit joined in a majority per curiam published opinion that reversed United States District Court Judge Nimmons' June 28, 2000 order[1] granting summary judgment in favor of James E. Loskill, a former Barnett Bank president and a participant in the Barnett Banks, Inc. Severance Pay Plan (the "Severance Pay Plan"), an ERISA employee welfare benefit plan. Judge Roney dissented with opinion. *Loskill v. Barnett Banks, Inc. Severance Pay Plan*, 289 F.3d 734 (11th Cir. 2002).

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[1] The basis of original jurisdiction in the district court was federal question, 28 U.S.C. § 1331.

At issue in the appeal to the Eleventh Circuit was the validity of a release amendment that was adopted on November 19, 1997 by Barnett's board of directors at its last meeting prior to merging with NationsBank, now Bank of America. Loskill, whose employment was terminated by NationsBank following the merger, was denied a severance benefit under the Severance Pay Plan because he would not execute a broad form general release in favor of NationsBank and related entities and persons.

Loskill's position before the trial court and on appeal was that a purported plan amendment to the Severance Pay Plan that is not approved and adopted by the Barnett Employees Benefits Committee, which was also the named fiduciary and plan administrator, is defective and void. Under the plain language of section 4.1(a) of the Severance Pay Plan,[2] it could not be amended unless the following

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[2] The Severance Pay Plan had a specific procedure for amendments. The amendment procedure was clearly set forth under Article 4 of the Severance Pay Plan, entitled, "Amendment and Termination." The applicable section was labeled: "4.1 **Amendment.** (a) **Procedure.**" (emphasis in the original). Section 4.1(a) of the Severance Pay Plan provides:

> **(a) Procedure.** The Company [Barnett Banks, Inc.] will have the right to amend the Plan from time to time. The [Barnett Employee Benefits] Committee will determine that an amendment is appropriate and will determine whether the amendment may significantly alter the cost of the Plan. The Committee or its agent will draft the amendment. Each amendment must be approved by a majority of the Committee members then in office. A duly authorized officer of the Company will adopt each amendment by placing his signature thereon. If the amendment may significantly alter the Plan's costs or expense, the Board must approve or ratify it by resolution. The Committee will deliver a copy of each amendment to each employer [including Barnett Bank, N.A.] within 30 days after adoption.

occurred: "The [Barnett Employee Benefits] Committee will determine that an amendment is appropriate and will determine whether the amendment may significantly alter the cost of the Plan. The Committee or its agent will draft the amendment. Each amendment must be approved by a majority of the Committee members then in office." Not one of these three separate requirements was met with respect to the release amendment.

Instead of following the Severance Pay Plan's procedures on amendment that required the Barnett Employee Benefits Committee to draft and approve any amendment, the Barnett board of directors at its last meeting prior to merging with NationsBank passed a resolution requiring all of Barnett's employees to sign a release before receiving a severance benefit. As found by the district court, the Barnett board "failed to even consult the Plan's amendment procedures," a finding with which the Eleventh Circuit agreed.[3] (App. B at 33)

The release amendment was adopted by Barnett's board because certain of Barnett senior executive employees, who were expected to have their employment terminated following the completion of the acquisition,[4] were threatening to sue. *Loskill*, 289 F.3d at 738-39 (App. A at 7, 9). The Barnett Employee Benefits Committee, the named

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[3] The Eleventh Circuit majority panel opinion stated, "it is clear from the record that the plan procedures were not consulted, . . ." *Loskill*, 289 F.3d at 739 (App. A at 9).

[4] The district court's summary judgment order found: "The record unequivocally establishes that, after the merger, NationsBank and Barnett knew which positions would be terminated and which employees would lose their jobs as a result of the merger. NationsBank wanted to require a release to prevent specific people from pursuing claims against NationsBank, thus saving it substantial sums of money." (App. B at 33)

fiduciary and plan administrator whose approval was mandated prior to the adoption of the release amendment, was to be comprised of senior executive employees of Barnett under section 5.1(c)(1) of the Severance Pay Plan. Its composition was significantly different from Barnett's board, which adopted the amendment.

The district court's summary judgment order found that the release amendment at issue in the appeal was not adopted in accordance with the procedures[5] specified in the Severance Pay Plan and as required by the Court in *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 85 (1995) and *Inter-Modal Rail Employees Ass'n v. Atchison, Topeka and Santa Fe Ry. Co.*, 520 U.S. 510, 515-16 (1997).[6] The

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[5] Loskill's answer brief in the Eleventh Circuit cited to the district court's summary judgment order and argued: "These violations of the amendment procedures required by the Severance Pay Plan were not mere technicalities. They were a wholesale usurpation by the Barnett board of directors, at the behest of NationsBank, of the responsibility placed by the Severance Pay Plan document in the fiduciary plan administrator, the Barnett Employee Benefits Committee."

[6] The district court cited to *Curtiss-Wright* for the following ERISA hornbook principle: "ERISA requires that a plan contain a procedure for amending the plan. Curtiss-Wright made clear that a plan sponsor may fulfill that ERISA requirement by simply stating that the plan could be amended 'by the company.' But, once the company decides to lay down a more complex procedure for amending the plan, it is bound to that decision. The utter disregard which Barnett showed toward the plan shows that the Plan Amendment was conceived, approved, and later administered with bad faith." (App. B at 34) The district court's summary judgment order also cited to and quoted from *Inter-Modal*, and found that the appellants' position ignored this "established Supreme Court precedent . . . There would be no point in having amendment procedures in the Plan if the company could circumvent them so easily." (App. B at 31-32)

Eleventh Circuit's majority panel opinion recognized that "Loskill claims that these procedures were violated, because the release amendment was not considered by the [Barnett Employee Benefits] committee and because the notification procedure was not followed." *Loskill*, 289 F.3d at 738 (App. A at 8). Nevertheless, the majority panel opined: "We, however, need not address this issue, because even if there was a technical violation of the procedures, the record does not support the district court's finding of bad faith." *Id.* (App. A at 8).[7] This was because the majority panel had observed, "courts typically will not invalidate an amendment for technical violations of a plan's procedures absent a showing of bad faith or active concealment on the part of the sponsor or detrimental reliance on the part of the beneficiaries." *Id.* (App. A. at 7). The majority panel opinion remanded to the district court to "further consider whether there was bad faith, active concealment, or detrimental reliance." *Id.* at 739 n. 5. (App. A at 9 n. 5).

Judge Roney's dissenting opinion recognized the majority panel opinion had raised the issue presented in this petition when it "applied the tests of bad faith, active concealment, and detrimental reliance to determine the validity of the amendment which was adopted in violation of the amendment procedures required by the plan." *Id.* at 740 (App. A at 11) (Roney, J. dissenting). Finally, Judge Roney's dissent concluded: "As far as we have been able to determine, this is the first circuit court case that has held that

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[7] The majority panel opinion of the Eleventh Circuit cited to the 1994 per curiam opinion of *Aldridge v. Lily-Tulip, Inc. Salary Ret. Plan Benefits Comm.*, 40 F.3d 1202, 1211-12 (11th Cir. 1994) as authority for its approach. *Loskill*, 289 F.3d at 738 (App. A at 7). *Aldridge* was decided before *Curtiss-Wright* and, as pointed out by Judge Roney in his dissent, involved an ERISA plan without provisions for amendment. *See Loskill*, 289 F.3d at 740 (Roney, J. dissenting) (App. A at 11).

an amendment adopted in violation of the procedures set forth in a plan is invalid only upon a further showing of bad faith, active concealment, or detrimental reliance." *Id.* (App. A at 12) (Roney, J. dissenting).

## REASONS TO GRANT THE WRIT OF CERTIORARI

The Majority Panel Published Opinion of the Eleventh Circuit Directly Conflicts with the Court's Holding in *Curtiss-Wright* and Its Statement in *Inter-Modal* Requiring Formal Plan Amendment Procedures be Followed in Order to Validly Amend or Alter an ERISA Plan.

The majority panel published opinion of the Eleventh Circuit directly conflicts with the Court's holding in *Curtiss-Wright* and its statement in *Inter-Modal* requiring formal plan amendment procedures be followed in order to validly amend or alter an ERISA plan. The Eleventh Circuit has become the only United States Court of Appeals to require an ERISA plan participant to establish bad faith, active concealment, or detrimental reliance as a prerequisite to attempting to invalidate a plan amendment that was not adopted in accordance with the procedures specified in an ERISA plan.

"Section 402(b)(3) of the Employee Retirement Income Security Act of 1974 (ERISA, 88 Stat. 875, 29 U.S.C. § 1102(b)(3), requires that every employee benefit plan provide 'a procedure for amending such plan, and for identifying the persons who have authority to amend the plan.'" *Curtiss-Wright*, 514 U.S. at 75. "The text of § 402(b)(3) actually requires two things: a 'procedure for amending [the] plan and '[a procedure] for identifying the persons who have authority to amend the plan.'" *Id.* at 78.

This petition, if granted, presents the issue of whether the plain language statutory requirements of section 402(b)(3) apply only if a plan participant first establishes bad faith, active concealment, or detrimental reliance as a prerequisite to attempting to invalidate a plan amendment

that was not adopted in accordance with the procedures specified in an ERISA plan.

The Court in *Curtiss-Wright*, 514 U.S. at 84-85 (emphasis added) held:

> In concluding that Curtiss-Wright's reservation clause sets forth a valid amendment procedure, we do not mean to imply that there is anything wrong with plan beneficiaries trying to prove that unfavorable plan amendments were not properly adopted and are thus invalid. This is exactly what respondents are trying to do here, and nothing in ERISA is designed to obstruct such efforts. But nothing in ERISA is designed to facilitate such efforts either. To be sure, some companies that have plans with the standard reservation clause may want to provide greater specification to their amendment procedures precisely to avoid such costly litigation. Or they may want to retain the flexibility that designating "[t]he Company" (read in light of corporate law) provides them. But either way, this is simply a species of a larger dilemma companies face whenever they must designate who, on behalf of the company, may take legally binding actions that third parties may later have an interest in challenging as unauthorized. *Cf.* R. Clark, Corporate Law § 3.3.2 (1986). It is not a dilemma ERISA addresses. *ERISA, rather, follows standard trust law principles in dictating only that whatever level of specificity a company ultimately chooses, in an amendment*

> *procedure or elsewhere, it is bound to that level.*

Furthermore, the Court in *Curtiss-Wright* explained that the fiduciary administrator of an ERISA plan is required to weed or sort out defective amendments from valid ones:

> Requiring every plan to have a coherent amendment procedure serves several laudable goals. First, for a plan not to have such a procedure would risk rendering the plan forever unamendable under standard trust law principles. *See* Restatement (Second) of Trusts § 331(2) (1957). Second, such a requirement increases the likelihood that proposed plan amendments, which are fairly serious events, are recognized as such and given the special consideration they deserve. Finally, having an amendment procedure enables plan administrators, the people who manage the plan on a day-to-day level, to have a mechanism for sorting out, from among the occasional corporate communications that pass through their offices and that conflict with the existing plan terms, the bona fide amendments from those that are not. In fact, plan administrators may have a statutory responsibility to do this sorting out. *See* 29 U.S.C. § 1104(a)(1)(D) (plan administrators have a duty to run the plan "in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of [the statute]," which would include the amendment procedure provision). That Congress may have had plan administrators in

> mind is suggested by the fact that § 402(b)(3), and § 402(b) more generally, is located in the "fiduciary responsibility" section of ERISA. *See* 29 U.S.C. §§ 1101-1114.
>
> ****
>
> As indicated earlier, plan administrators appear to have a statutory responsibility actually to run the plan in accordance with the currently operative, governing plan documents and thus an independent incentive for obtaining new amendments as quickly as possible and for weeding out defective ones.

*Id.*, 514 U.S. at 82-84.

Finally, the Court in *Inter-Modal Rail Employees Ass'n v. Atchison, Topeka and Santa Fe Ry. Co.*, 520 U.S. at 515-16, stated: "An employer may, of course, retain the unfettered right to alter its promises, but to do so it must follow the formal procedures set forth in the plan."

In contrast to the plain language of section 402(b)(3) of ERISA as explained by the Court in *Curtiss-Wright* and *Inter-Modal*, the majority panel published opinion of the Eleventh Circuit requires plan administrators, plan participants, and the courts to weed out defective ERISA plan amendments only when the adversely affected plan participant first establishes bad faith, active concealment, or detrimental reliance. Of course, to do so will require a fact intensive case by case analysis, where a plan amendment will be invalid only to participants who can establish that they were treated with bad faith, the amendment was actively concealed from them, or they detrimentally relied upon the plan prior to amendment. On the other hand, the same amendment will be valid as applied to other plan participants

who are not able to meet such a burden. Accordingly, the applicable ERISA plan document will vary depending upon the particular circumstances surrounding each participant claiming his or her benefit.

The scenario of determining an amendment's validity based upon the factual circumstances of a particular plan participant or the subjective intent of the plan sponsor directly conflicts with "ERISA's core functional requirements, that '[e]very employee benefit plan shall be established and maintained *pursuant to a written instrument*.' § 1102(a)(1) (emphasis added). In the words of the key congressional report, '[a] written plan is to be required in order that every employee may, *on examining the plan documents*, determine exactly what his rights and obligations are under the plan.'" *Curtiss-Wright*, 514 U.S. at 83 (emphasis in the original).

If the Eleventh Circuit majority panel opinion is allowed to stand, plan administrators and plan participants will not be able to know what their rights and obligations are under an ERISA plan, whose amendments were not adopted in accordance with prescribed procedures, without first having run the gauntlet of litigation, including appeals. Rather, Article III courts will now be required to develop a federal common law of bad faith, active concealment, and detrimental reliance to determine whether an amendment applies to a particular participant or beneficiary.

The development of a federal common law to determine the applicable plan document "runs counter to ERISA's commands . . . that the fiduciary shall administer the plan 'in accordance with the documents and instruments governing the plan,' § 1102(a)(1)(D) . . ." *Egelhoff v. Egelhoff*, 532 U.S. 141, 147 (2001). This also defeats the goal of uniform plan administration amongst participants.

*See id.* at 148. "ERISA already has an elaborate scheme in place for enabling beneficiaries to learn their rights and obligations at any time, a scheme that is built around reliance on the face of *written plan documents*." *Curtiss-Wright*, 514 U.S. at 83 (emphasis in the original). The applicable plan document will now depend on whether the participant or beneficiary challenging a purported amendment not adopted in compliance with the procedures specified in the plan can show bad faith, active concealment, or detrimental reliance, as these concepts become developed by Article III courts.

The net result of the Eleventh Circuit's majority panel's opinion and its remand to the district court is that, after four years of litigation, no one knows whether the release amendment is valid or not, despite the fact that it was adopted in violation of the Severance Pay Plan's explicit procedures on amendment. This is an untenable result under ERISA and demonstrates the breadth by which the majority panel opinion missed the mark when it overrode the plain language of section 402(b)(3) of ERISA and fundamental ERISA principles in favor of case by case factual inquiries into an undeveloped federal common law of bad faith, active concealment, and detrimental reliance.

For example, a uniform judicial determination on bad faith failed to take place in Loskill's case, as evidenced by comparing the district courts' strongly worded summary judgment order with the Eleventh Circuit's majority panel opinion. The majority panel opinion held it is not bad faith to require employees to release employment discrimination claims against their employer apparently because the release amendment "made good business sense," a phrase found in four separate places in the majority panel opinion. The district court had a different view of bad faith from that found by the majority panel, when it held: "The utter disregard which Barnett showed toward the plan shows that the Plan

Amendment was conceived, approved, and later administered with bad faith." (App. B at 34), quoted in *Loskill*, 289 F.3d at 738 (App. A at 7).

A factual determination of bad faith, active concealment, or detrimental reliance based upon a yet to be developed federal common law is completely extraneous to whether formal procedures have been followed or not in amending an ERISA plan. Case by case factual inquiries dependent upon the particular plan participant or the subjective intent of the plan sponsor should never be the basis to determine whether a plan amendment is valid or not.

The Majority Panel Published Opinion of the Eleventh Circuit Directly Conflicts with the Holdings of the United States Courts of Appeals for the Third and Seventh Circuits, which Require Formal Plan Amendment Procedures be Followed in Order to Validly Amend or Alter an ERISA Plan.

The United States Courts of Appeals for the Third and Seventh Circuits have both required that formal plan amendment procedures be followed in order to validly amend an ERISA plan.[8] *See Ackerman v. Waranco, Inc.*, 55 F.3d 117, 122 (3rd Cir. 1995); *Albedyll v. Wisconsin Porcelain Co. Revised Retirement Plan*, 947 F.2d 246, 255 (7th Cir. 1991) The Third and Seventh Circuits distinguish a failure to follow a plan procedure for amendment from the situations where the plan has no procedure at all or where there is a failure to

[8] Recently, the United States Court of Appeals for the Eighth and Tenth Circuits found that they need not reach this identical issue. *Allison v. Bank One*, 289 F.3d 1223, 1234 (10th Cir. 2002); *Ross v. Rail Car America Group Disability Income Plan*, 285 F.3d 735, 743 (8th Cir. 2002).

properly disclose[9] the amendment. *Ackerman*, 55 F.3d at 124-25; *Murphy v. Keystone Steel & Wire Co.*, 61 F.3d 560, 568-69 (7th Cir. 1995), *affirming*, 850 F.Supp 1367, 1380 (C.D. Ill. 1994) (distinguishing *Albedyll v. Wisconsin Porcelain Co. Revised Retirement Plan*, 947 F.2d 246 (7th Cir. 1991)). This is the same distinction[10] made by Judge Roney in his dissent in this case. *Loskill*, 289 F.3d at 740 (Roney, J., dissenting). (App. A at 12).

Thus, there is a split amongst the United States Courts of Appeals, which should be resolved by the Court.[11]

## CONCLUSION

For these reasons, Loskill requests that the Court grant his petition for writ of certiorari.

Respectfully submitted,

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[9] *See Lettrich v. J.C. Penney Co.*, 213 F.3d 765, 771 (3rd Cir. 2000) (collecting cases on disclosure).

[10] The same distinction was present in *Whitfield v. Torch Operating Co.*, 935 F.Supp. 822, 830-31 (E.D. La. 1996), one of the district court cases cited in the Eleventh Circuit's majority panel decision, which involved an informal severance plan that did not include a procedure for amending it or identifying the persons with authority to amend.

[11] The other district court case cited by the Eleventh Circuit majority panel was *Alford v. Kimberly-Clark Tissue Co.*, 14 F.Supp.2d 1290, 1297 (S.D. Ala. 1998), which acknowledged: "The federal judiciary is also divided on the question of the proper remedy for a procedural violation." The Alabama district court then quoted from the Seventh Circuit's decision in *Murphy v. Keystone Steel & Wire Co.*, 61 F.3d at 68, that this question was left open by the Court in *Curtiss-Wright*.

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# APPENDIX

**Appendix A**

**CORRECTED**

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 01-11858

D.C. Docket No. 98-00986-CV-J-21B

JAMES E. LOSKILL,

Plaintiff-Appellee,

versus

BARNETT BANKS, INC. SEVERANCE PAY PLAN, THE BARNETT BANKS, INC. SEVERANCE PAY PLAN, et al.,

Defendants-Appellant.

Appeal from the United States District Court
for the Middle District of Florida

(April 25, 2002)

BEFORE: WILSON, RONEY, AND FAY,

PER CURIAM:

The Barnett Banks, Inc. Severance Pay Plan, the Employee Benefits Committee of the Barnett Banks, Inc. Severance Pay Plan, the NationsBank Corporate Benefits Committee, and the NationsBank Benefits Appeals Committee appeal the district court's grant of summary judgment in favor of James E. Loskill on his claim for

severance benefits under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001--1461.

## BACKGROUND

On August 29, 1997, Barnett Banks, Inc. entered into a merger agreement with NationsBank, whereby Barnett shareholders would receive shares of NationsBank stock in exchange for their Barnett stock. This merger was approved by the shareholders on December 19, 1998.

Sometime after the merger agreement was entered into but before the shareholders approved the merger, Charles Loring, a manager in NationsBank's human resources department, contacted Jeff McCutcheon, a manager in Barnett's human resources department. He recommended that Barnett consider adding a provision to its severance plan that would require employees to execute a release prior to receiving severance benefits under the plan. After the executives in the human resources department considered this proposal and determined that it made good business sense to protect the company from impending litigation, McCutcheon contacted Cathy Cosby, senior counsel and corporate secretary for Barnett, and asked her to place the release amendment on the agenda for the next and final board meeting of Barnett's board of directors.[1]

After the amendment was placed on the agenda, it was assigned to the Executive Compensation and Management Development Committee. On November 19, 1997, the committee recommended approval of this

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[1] This was the last opportunity to amend the plan for two years, because no changes could be made to the plan for two years after a change in control.

amendment by the full board. Later that day, after determining that it made good business sense, the board adopted the release amendment, which provides,

> Notwithstanding any provision of the Plan to the contrary, Severance Benefits shall not be paid to an employee unless and until the Employee delivers a full release to his Employers of all employment-related claims, including all rights and claims under the Age Discrimination in Employment Act of 1967, as amended ("ADEA").

None of the board members knew that the release amendment was proposed by NationsBank, but when someone asked whether NationsBank would approve, the board was informed that NationsBank supported the amendment.

During this time, Loskill served as the president of a subsidiary branch of Barnett in Pinellas County, Florida. Following the merger, Loskill was terminated and advised that he would be entitled to severance benefits if he executed a release. He refused to do so, and, as a result, he filed a formal claim for benefits with the plan administrator on July 31, 1998. The NationsBank Benefits Appeals Committee reviewed his claim and determined that he would be entitled to $110,347.73 in benefits if he executed a release.

Consequently, Loskill brought suit under ERISA, asserting that he was wrongly denied benefits because he refused to execute a release. He claimed that the release violated the plan's No Cut-back provision. In a subsequent amendment to his complaint, Loskill asserted that the amendment also was invalid, because the amendment was not adopted in accordance with the procedures set forth in the plan. Both Loskill and Barnett moved for summary

judgment,[2] and, on June 28, 2000, the court granted summary judgment in favor of Loskill. It found that the release amendment violated the No Cut-back provision and that Barnett did not follow the amendment procedures set forth in the plan. It then sua sponte determined that the release was void, because Barnett acted in bad faith. The district court awarded Loskill attorney's fees and costs, as well as prejudgment interest at the statutory rate in Florida.

## STANDARD OF REVIEW

We review the grant of summary judgment de novo, "applying the same standards as the district court." *Stewart v. Happy Herman's Cheshire Bridge, Inc.*, 117 F.3d 1278, 1284 (11th Cir. 1997). Summary judgment should be awarded when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Viewing the evidence in the light most favorable to the nonmoving party, we ask "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986); *Stewart*, 117 F.3d at 1285.

## DISCUSSION

### I.

The district court found that the release amendment was prohibited under the No Cut-back provision, because "the plain meaning of [that] provision is to prevent the reduction or elimination of severance benefits upon the

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[2] This was Loskill's second motion for summary judgment.

passing of a Plan amendment." That provision provides, "No amendment will eliminate or reduce any Employee's right to Severance Benefits accrued before the effective date of the amendment, to an amount less than the amount he would have received if he had had a Qualified Termination the day before the effective date of the amendment." We cannot find that the release amendment was prohibited under that language.

"Employers or other plan sponsors are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans." *Curtiss-Wright Corp. v. Schoonejongen,* 514 U.S. 73, 78 (1995). Once a sponsor contractually cedes any of those rights, however, it is bound by its contract. *Id.* at 85. As a result, Barnett was not entitled to amend the plan in a way that would violate the anticutback provision, because it ceded its rights to do so under that provision. Thus, we must determine whether the release amendment constitutes a reduction or elimination of benefits under that provision.

In *Lockheed Corp. v. Spink,* 517 U.S. 882, 888 (1996), the United States Supreme Court addressed whether an employer's requirement that an employee sign a release of all claims against the employer prior to receiving benefits under a welfare plan violated § 406 of ERISA. Although The Court did not address whether such a requirement would violate an anticutback provision, its discussion provides some guidance as to whether we should view the release amendment as a reduction or elimination of benefits or as a condition precedent to the receipt of those benefits. The Court stated,

> [An] employer can ask [an] employee to continue to work for the employer, to cross a picket line, or to retire early. The execution of a release of claims

> against the employer is functionally no different; like these other conditions, it is an act that the employee performs for the employer in return for benefits.

*Id.* at 894. Thus, it seems clear that the Supreme Court views this type of requirement as a condition precedent.[3]

In addition, the language of the anticutback provision further supports a determination that the release amendment should be viewed as a condition precedent. Under that provision, the reduction or elimination of accrued benefits is prohibited. The release amendment, however, merely affects an employee's entitlement to those benefits. The amount of benefits that Loskill would have received under the plan was not altered by the release amendment; rather, Loskill's receipt of those benefits was conditioned upon the execution of a release. If he had executed a release, he would have received the amount of benefits available to him prior to the amendment.

Thus, as we find that the release amendment to the plan merely was a condition precedent, we must conclude that the release amendment does not violate the anticutback provision of the plan. Consequently, we now must determine whether the board failed to follow the amendment procedures in the plan, thus voiding the release amendment.

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[3] Indeed, the release amendment in this case seems no different than other conditions precedent within the plan. For example, under the plan, the receipt of benefits is conditioned upon the occurrence of a qualified termination and the nonoccurrence of a disqualifying event.

II.

The district court found "that the [release] [a]mendment was conceived, approved, and later administered with bad faith." It cited the following as evidence of bad faith: (1) no changes could be made to the plan for two years after a change in control; (2) the release amendment was adopted in response to the threat of lawsuits by employees; and (3) "Barnett, in its hurry to do NationsBank's bidding, failed to even consult the Plan's amendment procedures."

An employer or plan sponsor generally may "adopt, modify, or terminate" a welfare plan at will, but once it contractually cedes that right, it is bound by its contract. *Curtiss-Wright Corp.*, 514 U.S. at 78, 85. Despite this rule, courts typically will not invalidate an amendment for technical violations of a plan's procedures absent a showing of bad faith or active concealment on the part of the sponsor or detrimental reliance on the part of the beneficiaries. *Aidridge v. Lily-Tulip, Inc. Salary Ret. Plan Benefits Comm.*, 40 F.3d 1202, 1211-12 (11th Cir. 1994) (per curiam); *Alford v. Kimberly-Clark Tissue Co.*, 14 F. Supp. 2d 1290, 1299 (S.D. Ala. 1998). This approach has been found to "serve[] the dual purpose of protecting the rights of beneficiaries to the plan while allowing flexibility to the plans to grow or diminish at any time, as allowed by law." *Whitfield v. Torch Operating Co.*, 935 F. Supp.822, 833 (E.D. La. 1996).

The amendment procedures set forth in the plan in this case provides as follows:

> The Company will have the right to amend the Plan from time to time. The Committee will determine that an amendment is appropriate and will determine whether the amendment may significantly alter the

> cost or expense of the Plan. The Committee or its agent will draft the amendment. Each amendment must be approved by a majority of the Committee members then in office. A duly authorized officer of the Company will adopt each amendment by placing his signature thereon. If the amendment may significantly alter the Plan's costs or expense, the Board must approve or ratify it by resolution. The Committee will deliver a copy of each amendment to each Employer within 30 days after adoption.

Loskill claims that these procedures were violated, because the release amendment was not considered by the committee and because the notification procedure was not followed. We, however, need not address this issue, because even if there was a technical violation of the procedures, the record does not support the district court's finding of bad faith.

The record indicates that McCutcheon was contacted by Loring of NationsBank, who recommended that Barnett consider amending the plan to include a release requirement, and that a release amendment was proposed to the board after McCutcheon and others in the human resources department determined that amending the plan made good business sense. The record also indicates that the November 19, 1997 board meeting was the last opportunity that Barnett had to amend the plan, because the plan provided that no changes could be made to the plan for two years after a change in control.

It is, however, what we do not find in the record that compels our conclusion that the record does not support a finding of bad faith. There is no indication in the record that NationsBank ever contacted Barnett about this matter after Loring's initial telephone call. In addition, nothing in the record suggests that NationsBank was involved in any way in

the adoption of the release amendment or that the board merely accepted NationsBank's recommendation without independently considering it. Although it is clear from the record that the plan procedures were not consulted, it also seems clear that none of the employees and board members involved in the consideration of this amendment believed that the procedure they followed violated the plan.[4] Finally, even though the board was concerned about threats of litigation, it considered the release amendment and determined that it made good business sense to adopt it; nothing in the record indicates that the board adopted the release amendment merely to deprive employees of benefits under the plan.

As a result, we cannot conclude that the release amendment was adopted in bad faith.[5]

## CONCLUSION

Thus, we REVERSE the district court's grant of summary judgment in favor of Loskill and REMAND this case to the district court for proceedings consistent with this opinion.[6]

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[4] Although there were only a few depositions in the record, those employees who were deposed thought they were following normal procedures. We also can infer that the board would not have taken this action if it believed it did not have the authority to do so.

[5] Although we do not find that the record before us supports a finding of bad faith, we remand this case with the instruction that the district court further consider whether there was bad faith, active concealment, or detrimental reliance.

[6] In light of our holding, we need not consider what statutory rate of interest should have been applied to determine the amount of prejudgment interest.

RONEY, Circuit Judge, dissenting:

I respectfully dissent. I would affirm the district court on the ground that the release amendment violates the anticutback provision of the severance plan because it reduces the value of severance benefits after they have already accrued. The plan's anticutback provision reads: "No amendment will eliminate or reduce any Employee's right to Severance Benefits accrued before the effective date of the amendment." The argument that the release provision does not reduce the accrued benefits to which Loskill would be entitled because it "merely affects an employee's entitlement to those benefits" simply misinterprets the language and the intent of the provision. The anticutback provision must be interpreted to mean the right to "full" accrued severance benefits.

If an employee must give up something of value to get the benefits otherwise accrued, that effectively reduces the benefits. The right to sue for employment discrimination carries economic value. The release amendment forces Loskill to forfeit that right and value to Barnett. This reduces the net value to Loskill of the severance benefits to be paid to him. Thus, the amendment requires Loskill to sign a release that "cuts-back" the value of his severance benefit by the value of his employment discrimination claim. This is precisely the type of amendment the anticutback provision is intended to prevent.

Reliance upon *Lockheed Corp. v. Spink, 517* U.S. 882 (1996) to hold that this is a mere "condition precedent" to the receipt of those benefits is simply misplaced. *Lockheed* addressed a release provision that affected prospective benefits, not accrued benefits. The Supreme Court there held that requiring execution of a release was a permissible condition precedent to the receipt of *increased* benefits. The

condition was required to be met for additional benefits to accrue. The release amendment in this case affects benefits that have already accrued. Any condition placed upon the receipt of benefits after they have already accrued is a "condition subsequent," not a "condition precedent." If that condition requires the employee to give up something of value, it surely violates the anticutback provision. If Barnett had amended its plan to cease further benefit accruals unless and until a release provision was executed, *Lockheed* would apply. But that is not the case here.

By forcing Loskill to exchange something of value for his already accrued benefits, Barnett has "cutback" his accrued benefits in a way that is not permissible under the clear terms of the plan.

I would affirm the judgment for Loskill.

Since the Court has decided to the contrary, it then applied the tests of bad faith, active concealment, and detrimental reliance to determine the validity of the amendment which was adopted in violation of the amendment procedures required by the plan. These tests were heretofore established in cases where the plan had no provisions for amendment. *See Aidridge v. Lily-Tulip, Inc. Salary Ret. Plan Benefits Comm.*, 40 F.3d 1202, 1211-12 (11th Cir. 1994); *Murphy v. Keystone Steel & Wire Co.*, 61 F.3d 560 (7th Cir. 1995).

Having decided that the amendment here violates the anti-cutback provision of the plan, I need not decide whether such tests should apply to plans which provide procedures for amendment such as this one, or whether the mere violation of amendment procedures required by the plan makes the amendment invalid without more. *See Albedyll v. Wis. Porcelain Co. Revised Ret. Plan,* 947 F.2d 246 (7th Cir.

1991) (amendment that is not passed in accordance with the plan's amendment procedures is invalid); *Coleman v. Nationwide Life Ins. Co.*, 969 F.2d 54, 57-8 (4th Cir. 1992) (ERISA § 402(b)(3) requires that any plan modification must be implemented in conformity with the amendment procedures or it is of no effect); *Nachwalter v. Christie*, 805 F.2d 956 (11th Cir. 1986) (a written plan may not be amended orally); *see also Curtiss-Wright v. Schoonejongen*, 514 U.S. 73, 85 (1995) ("whatever level of specificity a company ultimately chooses, in an amendment procedure or elsewhere, it is bound to that level."); *Inter-Modal Rail Employees Ass'n v. Atchison, Topeka and Santa Fe Ry. Co.*, 520 U.S. 510, 515-16 promises, but to do so it must follow the formal procedures set forth in the plan."). As far as we have been able to determine, this is the first circuit court case that has held that an amendment adopted in violation of the procedures set forth in a plan is invalid only upon a further showing of bad faith, active concealment, or detrimental reliance. *But see Alford v. Kimberly-Clark Tissue Co.*, 14 F. Supp. 2d 1290, 1299 (S.D. Ala. 1998) *and Whitfield v. Torch Operating Co.*, 935 F. Supp. 822, 831 (E.D. La. 1996).

FILED U.S. COURT OF APPEALS ELEVENTH CIRCUIT
APRIL 25, 2002
THOMAS K. KAHN CLERK

## Appendix B

**UNITED STATES DISTICT COURT**
**MIDDLE DISTRICT OF FLORIDA**
**JACKSONVILLE DIVISION**

FILED 00 JUN 28 AM 10:24
CLERK, US DISTRICT
COURT MIDDLE COURT
JACKSONVILLE DIVISION

James E. Loskill,

Plaintiff,

v. Case No. 3:98-cv-986-J-21A

Barnett Banks, Inc. Severance Pay Plan, Employee Benefits Committee of the Barnett Banks, Inc. Severance Pay Plan, NationsBank Corporation Corporate Benefits Committee, and NationsBank Benefits Appeals Committee,

Defendants.

**ORDER**

This Cause comes before the Court on Plaintiffs Motion for Summary Judgment (Dkt. 3), Defendants' Response in Opposition to Plaintiff's Motion for Summary Judgment and Cross-Motion for Summary Judgment (Dkt. 19), Plaintiffs Opposition to Defendants' Cross-Motion for Summary Judgment (Dkt. 25), Plaintiff's Motion for Summary Judgment on the Basis that the Purported Section 3.10 Amendment was Not Properly Adopted and Made Available (Dkt. 68), and Defendants' Opposition to Plaintiffs Motion for Summary Judgment on the Basis that the Section

3.10 Amendment Was Not Properly Adopted or Made Available (Dkt. 81).

**I. Factual and Procedural History**

Plaintiff James E. Loskill was employed by Barnett Banks Inc., or a subsidiary or predecessor thereof, from September 13, 1982, through January 31, 1998. During his employment with Barnett, Loskill rose to the position of president of Barnett Bank, N.A., Pinellas County, headquartered in St. Petersburg.

On August 29, 1997, Barnett Banks, Inc., and NationsBank Corporation entered into a merger agreement which was approved by the stockholders of Barnett Banks, Inc. In November, 1997, NationsBank contacted Barnett personnel and requested that the Barnett Board of Directors add a provision to the Barnett Banks, Inc. Severance Pay Plan ("Plan")[1], requiring a release of employment-related legal claims in exchange for severance benefits under the Plan. NationsBank represented that it had had previous problems with lawsuits over employment contracts from personnel terminated as a result of earlier mergers. Prior to this amendment, the Plan did not require any release to be signed before payment of benefits.

On November 19, 1997, Barnett's Executive Compensation Committee reviewed the proposed amendment and recommended it for Board approval. On that same date, the Board of Directors met for its last time and passed the proposed amendment as "Resolution G," which provided:

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[1] The Barnett Banks, Inc. Severance Pay Plan *is* an ERISA welfare benefit plan under 29 U.S.C. § 1002(1).

> **3.10 Release.** Notwithstanding any provision of the Plan to the contrary, Severance Benefits shall not be paid to an employee unless and until the Employee delivers a full release to his Employers of all employment-related claims, including all rights and claims under the Age Discrimination in Employment Act of 1967, as amended ("ADEA").

Discussion at both the Executive Compensation Committee level and at the Board of also discussed whether it was a good business decision to pass the amendment. Barnett in-house counsel specifically commented that the release would make "good business sense" since some executives were already threatening to sue. Based on these discussions, the Board passed Resolution G.

On December 19, 1997, the Barnett shareholders voted to accept the merger. The parties agree that this constituted a "change in control" under the Severance Plan. Plan at ¶ 1.4. On January 9, 1998, Barnett Bank, Inc., merged into NB Holdings--a subsidiary of NationsBank Corporation[2]. As a result of the merger, Plaintiff was involuntarily terminated from his employment effective January 31, 1998.

On July 29, 1998, Steven Carpenter of NationsBank Corporation notified Plaintiff that his lump sum severance benefit under the Plan was conditioned on the Plaintiff's executing a full release of all employment-related claims. Plaintiff made a formal written claim for benefits under the

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[2] On September 30, 1998, NationsBank Corporation merged into NationsBank (DE) Corporation which, on the same date as the merger, changed its name to BankAmerica Corporation ("Bank of America"). See Amended Complaint at ¶ 10.

Plan on July 31, 1998. The Committee met on September 16, 1998, to consider Plaintiff's claim for severance benefits. Thereafter, Anne West of NationsBank Corporation notified Plaintiff that his claim for severance benefits had been considered by the NationsBank Benefits Appeal Committee and that he would be required to execute a release before severance benefits would be paid under the Plan. Specifically, the letter stated:

> The Committee determined that you are entitled to a lump sum benefit of $110,347.73 under the terms of the Plan provided you execute and deliver to NationsBank the release required by Section 3.10 of the Plan. I enclose a release for this purpose. Upon your execution of the enclosed release and the expiration of the seven day revocation period, we will forward this benefit payment to you.
>
> . . . .
>
> Your attorney's July 31, 1998 letter states that it is your position that Section 4.1(b) of the Plan prohibits NationsBank or its successors or affiliates from conditioning your receipt of severance benefits upon your execution of a release. Specifically, the Committee understands that you are claiming that the amendment to add Section 3.10 to the Plan, which requires that a release be signed before any severance benefits will be paid from the Plan, cannot apply to your benefits to the extent those severance benefits are based on service prior to November 19, 1997, the effective date of the amendment.
>
> Section 4.1(b) provides as follows (emphasis

added):

> **No Cut-back.** No amendment will eliminate or reduce any Employee's right to Severance Benefits accrued before the effective date of the amendment, to an amount less than the amount he would have received if he had had a Qualified Termination the day before the effective date of the amendment.

The amendment to add Section 3.10 did not eliminate or reduce the amount of the severance benefit to which you are entitled but merely added a condition precedent to the benefit payment. Therefore, the amendment to add Section 3.10 was not in violation of the "no cut-back" provision to Section 4.1(b).

Plaintiff refused to execute a release and has been denied severance benefits as a result.

On October 6, 1998, Plaintiff filed suit[3] against the Defendants for recovery of severance benefits, to enforce his rights under the Plan, and for an award of prejudgment interest, reasonable attorney's fees, and costs. Thereafter, Plaintiff filed a motion for summary judgment claiming that

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[3] Plaintiff filed his original Complaint (Dkt. 1) on October 6, 1998, in which he named only the Barnett Banks, Inc. Severance Pay Plan and Employee Benefits Committee of the Barnett Banks, Inc. Severance Pay Plan as Defendants. Thereafter, pursuant to the Court's September 9, 1999, Order (Dkt. 87) directing the joinder of NationsBank Benefits Appeals Committee and the NationsBank Corporation Corporate Benefits Committee as party defendants in the case, Plaintiff filed his Amended Complaint (Dkt. 89) on October 8, 1999.

the Committee's decision was wrong because Section 3.10 violates the No Cut-Back Provision of the Plan. Defendants filed a Response in Opposition to Plaintiff's Motion for Summary Judgment and Cross-Motion for Summary Judgment asserting that the Committee properly exercised its discretion in construing the terms of the Plan.

Subsequently, on June 23, 1999, Plaintiff filed a second motion for summary judgment asserting that Resolution G, the purported Section 3.10 amendment was not properly approved by a majority of the members of the Employee. Benefits Committee, adopted by a duly authorized officer of Barnett, and made available to employees of Barnett Bank, N.A, as required by Section 4.1(a) of the Plan. Defendants filed an Opposition to Plaintiff's Motion for Summary Judgment on the Basis that the Section 3.10 Amendment was not Properly Adopted or Made Available in which they assert that the Barnett Banks, Inc. Board of Directors—which had the ultimate control over the terms of the Plan—properly approved the Plan thus obviating the need for the members of the Employee Benefits Committee to consider the amendment. Moreover, Defendants assert that the Board's adoption of the amendment fully comported with ERISA and Florida corporate law requirements.

The Court summarizes below the pertinent sections of the Plan for purposes of the summary judgment motions:

1.3 **Board** means the Board of Directors of the Company.

* * *

1.6 **Committee** means the Employee Benefits Committee, the members of which will hold that office by virtue of their job titles,. . . which will be the Plan Administrator, and

which will have primary responsibility for administering the Plan under Article 5.

1.7 **Company** means Barnett Banks, Inc., a Florida corporation, or its successor or assign which adopts the plan.

* * *

1.17 **Plan** means the Barnett Banks, Inc., Severance Pay Plan.

1.18 **Plan** Administrator means the Committee.

* * *

4.1 **Amendment**

(a) **Procedure.** The Company will have the right to amend the Plan from time to time. The Committee will determine that an amendment is appropriate, and will determine whether the amendment may significantly alter the cost or expense of the Plan. The Committee or its agent will draft the amendment. Each amendment must be approved by a majority of the Committee members then in office. A duly authorized officer of the Company will adopt each amendment by placing his signature thereon. If the amendment may significantly alter the Plan's cost or expense, the Board must approve or ratify it by resolution. The Committee will deliver a copy of each amendment to each Employer within 30 days after adoption.

(b) **Prohibited Amendments**. The authority to amend the Plan will be limited as follows:

(1) **No Cut-back.** No amendment will eliminate or reduce any Employee's right to Severance Benefits accrued

before the effective date of the amendment, to an amount less than the amount he would have received if he had had a Qualified Termination the day before the effective date of the amendment.

* * *

**5.1 (c) The Employee Benefits Committee**. The Employee Benefits Committee will serve as Plan Administrator.

**(1) Appointment and Termination of Office.**
The Employee Benefits Committee will consist of not fewer than 3 Employees who, by authority of the Board resolution described in Subsection (a), will serve as such by virtue of their job titles....

**(2) Organization of Committee**. . . . The Committee may appoint agents who may or may not be Committee members, as it considers necessary for the effective performance of its duties, and may delegate to the agents ministerial powers and duties as it considers expedient or appropriate.

## II. Summary Judgment Standard

Summary judgment is appropriate only when a court is satisfied "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ. P. 56(c). In making this determination, a court must view all the evidence in the light most favorable to the non-moving party. See Samples on Behalf of Samples v. City of Atlanta, 846 F.2d 1328, 1330 (11th Cir. 1988). The burden of establishing the absence of a genuine issue is on the moving party. See Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). However, the burden extends only to facts that might affect the outcome of the suit under the governing law. "Factual disputes that are irrelevant or unnecessary will not

be counted." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Once this burden is met, the non-moving party must "go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, arid admissions on file,' designate 'specific facts showing that there is a genuine issue for trial." Celotex Corp., 477 U.S. at 342. However, a plaintiff need only present evidence from which a jury might return a verdict in his favor in order to survive a summary judgment motion. See Samples on Behalf of Samples v. City of Atlanta, 846 F.2d at 1330.

## III. Standard of Review for Denial of ERISA Benefits

Title 29 U.S.C. § 1 132(a)(1)(B) governs actions challenging the denial of ERISA benefits. That statutory section, however, does not establish a standard of judicial review. The Supreme Court, in Firestone Tire and Rubber Co. v. Bruch, 489 U.S. 101, 110, 109 S.Ct. 948, 103 L.Ed.2d 80,92(1989), noted that courts are to develop a "federal common law of rights and obligations under ERJSA-regulated plans." (quoting Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 107 S.Ct. 1549,95 L.Ed.2d 39(1987)). The Court went on to hold that "a denial of benefits challenged under § 1132(a)(1)(B) is to be reviewed under a de novo standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." Firestone, 489 U.S. at 115, 109 S.Ct. at *956,* 103 L.Ed.2d at 95. The Court qualified this holding by stating that "if a benefit plan gives discretion to an administrator or fiduciary who is operating under a conflict of interest, that conflict must be weighed as a 'facto[r] in determining whether there is an abuse of discretion." Id. (quoting Restatement (Second) of Trusts § 187, Comment d (1959)).

The Eleventh Circuit has interpreted Firestone to mandate an arbitrary and capricious standard of review — often used interchangeably with an abuse of discretion standard — if the plan administrator or fiduciary has discretionary authority to make eligibility determinations or to construe disputed terms of the plan. See Hunt v. Hawthorne Assocs., Inc., 119 F.3d 888, 912 (11th Cir. 1997); see also Jett v. Blue Cross & Blue Shield of Ala., 890 F.2d 1137, 1139 (11th Cir. 1989). The language conferring discretion on the administrator or fiduciary must be "express language unambiguous in its design" in order to trigger the arbitrary and capricious standard of review. Kirwan v. Marriott Corp., 10 F.3d 784, 789 (11th Cir. 1994). The Court should apply a heightened arbitrary and capricious standard, however, if the plan administrator or fiduciary suffers from a conflict of interest in rendering its determination. Firestone, 489 U.S. at 115, 109 S.Ct. at *956,* 103 L.Ed.2d *95.*

The Eleventh Circuit has noted that, when an insurance company is both the ERISA plan fiduciary and the insurance company responsible for paying the claims, a strong conflict of interest exists making application of the heightened arbitrary and capricious standard appropriate.

> [A] fiduciary operating under a conflict of interest may be entitled to review by the arbitrary and capricious standard for its discretionary decisions as provided in the ERISA plan documents, but the degree of deference actually exercised in application of the standard will be significantly diminished.

Brown v. Blue Cross & Blue Shield of Ala., 898 F.2d *1556,* 1568 (11th Cir. 1990). The degree of deference exercised in the application of the standard varies "depending upon the dynamics of the decisionmaking process." Id. at 1564. A disinterested, impartial decisionmaker deserves the greatest

deference. But, a decisionmaker with a serious conflict of interest may deserve "slight, even zero [deference]; the decision if wrong may be unreasonable." Id.

The Brown court also noted that "[a] finding of a conflicting interest has a tremendous impact on the evaluation of the fiduciary's actions." Id. at 1565. The rationale behind this approach is that, whether conscious or not, a conflicted fiduciary may favor its interests over the interests of the plan beneficiaries. Thus, the Brown Court held:

> [W]hen a plan beneficiary demonstrates a substantial conflict of interest on the part of the fiduciary responsible for benefits determinations, the burden shifts to the fiduciary to prove that its interpretation of plan provisions committed to its discretion was not tainted by self-interest. That is, a wrong but apparently reasonable interpretation is arbitrary and capricious if it advances the conflicting interest of the fiduciary at the expense of the affected beneficiary or beneficiaries unless the fiduciary justifies the interpretation on the ground of its benefit to the class of all participants and beneficiaries.

Id. at 1566. The Brown court set out a two-step process whereby a court could test the arbitrary and capricious standard against the specific facts present in a given situation. The first step is determining the legally correct interpretation of the disputed plan provision.[4] Id. at 1570. The second step

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[4] "It is fundamental that the fiduciary's interpretation first must be 'wrong' from the perspective of de novo review before a reviewing court is concerned with the self-interest of the fiduciary." Id. at 1566, n.12.

for a court is to evaluate whether the fiduciary was arbitrary and capricious in adopting a different interpretation. Id. The Brown court emphasized that the fiduciary should bear the burden of showing that his conflict of interest has not tainted his judgment. Id. at 1568.

Plaintiff argues that a de novo standard of review should be employed in this case because, under the clear terms of the Plan, the NationsBank Benefits Appeals Committee is not the committee given the discretion to construe the terms of the Plan and to determine claims. Since the committee which determined the benefits due the Plaintiff was not the committee specified in the Plan, the Plaintiff argues that a de novo standard of review should be used by this Court. Alternatively, the Plaintiff argues that a heightened arbitrary and capricious standard of review should apply because the severance pay plan is an unfunded plan. As such, severance payments are paid out of the general assets of the company and, since the same company makes the Plan's eligibility determinations, a heightened standard is appropriate.

Defendants argue that the arbitrary and capricious standard of review should apply. In support of this argument, the Defendants argue that the Plan grants the Committee broad discretion to construe the terms of the Plan and to determine claims for benefits thereunder. Since the NationsBank Committee determined the amount of benefits owed and that a release was required, its decision should be scrutinized under the arbitrary and capricious standard.

The Court notes that, in the present case, the Severance Plan is unfunded. Plan at ¶ 3.7. Thus, the case at bar is analogous to the Brown case in that the benefits paid under the Plan come from the general assets of the company. Furthermore, the members of the NationsBank Committee

are employees of NationsBank. Thus, the company is making both benefit determinations and payments of approved claims. Importantly, any claims *denied* under the Plan could result in a substantial savings to NationsBank.[55] This is the same situation presented to the Eleventh Circuit in Brown. The Court finds that the proper standard of review for NationsBank's denial of benefits to the Plaintiff is the heightened arbitrary and capricious standard.

## IV. The Legal Interpretation of the 3.10 Release Amendment

### A. The 4.1(b) No Cut-Back Provision

Under the guidelines set forth in Brown, the Court must first determine the correct legal interpretation of the 3.10 Release Amendment ("Amendment"). Plaintiff takes the position that the Amendment is a prohibited amendment under the terms of paragraph 4.1(b), the "No Cut-Back" provision, previously quoted herein.

The Plaintiff argues that the Amendment denies payment of severance otherwise due to eligible participants. Prior to the Amendment, the Plan entitled Plaintiff to severance without the execution of a general release. Therefore, the Plaintiff sees the Amendment as eliminating his right to severance otherwise due him under the Plan the day before the Amendment was passed.

Plaintiff's argument relies on the plain meaning of the terms of the Plan. According to Plaintiff, a plain reading of 4.1(b) shows that the release condition imposed by the

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[5] Denial of claims from this case and related cases could easily save NationsBank hundreds of thousands of dollars.

Amendment effectively eliminated every dollar of severance otherwise due him. Therefore, the Plaintiff argues, even if the Amendment had been adopted in conformity with the Plan's amendment procedures, the Amendment should still be declared invalid because Plaintiff has not received the severance benefits he would otherwise have received the day before its enactment. Moreover, in his response to Defendants' cross-motion for summary judgment, Plaintiff asserts that the NationsBank Benefits Appeals Committee was not the proper entity to decide his claim and that it violated the Plan procedures in denying his claim and in denying him an appeal.

In their response and cross-motion for summary judgment, Defendants argue that their interpretation that the Section 3.10 amendment did not constitute a violation of the No Cut-Back Provisions was reasonable. Defendants point out that ERISA welfare benefits generally do not vest or accrue automatically as ERISA pension benefits do. Thus, Defendants argue, ERISA's anti-cut back provision (29 U.S.C. § 1054(g)) does not apply to welfare benefit plans, such as the Severance Plan in this case. Defendants emphasize that in order for a welfare benefit plan to provide for vesting or accrual of benefits, the plan must establish it in clear, express language. Defendants also argue that the claimant has the burden of proving a vested right to benefits.

Defendants point to section 2.3 of the Plan, which provides that a Plan participant's rights vest upon a change in control. They argue that if the Plan provided for vesting and accrual based upon a participant's prior service, then there would be no need for a provision expressly vesting his benefits upon a change in control. Section 2.3 also shows that the company knew how to provide for vesting when it wanted to.

Defendants also argue that the Plan does not provide for accrued benefits. In support of this argument, Defendants assert that the term "accrued" is not used anywhere else in the Plan. To the contrary, Defendants assert that, rather than benefits accruing, it is years of service that accrue under the Plan. Defendants argue that the no cut-back provision must be read in conjunction with Article 3 of the Plan which defines the level of an employee's benefits. In this respect, the no cut-back provision prevents reduction of a participant's *level* or *amount* of benefits (e.g., based upon years of service), but does not preclude the addition of a condition precedent to the receipt of such benefits. Defendants argue that the Amendment only imposes a condition precedent just like the other preconditions which must be satisfied in order to have a Qualified Termination or one of the disqualifying events under Article 2.

The Court agrees with Defendants and finds that the Plan does not provide for vesting of severance benefits. Reading the plain terms of the Plan, it is clear that the company knew how to provide for vesting and did not do so in this provision. Nevertheless, as pointed out by Defendants, vesting and accrual of benefits is not the same thing. A plain reading of the Plan clearly indicated that it was the intention of the company, as drafter, to protect employees from detrimental Plan amendments. Thus, the no cut-back provision refers to the accrual of benefits — not the accrual of years as suggested by Defendants. If only the accrual of years were implicated, then the no cut-back provision would have no true meaning. Years are years; no formula is needed to calculate the years of service accrued. The Court is not inclined to interpret a Plan provision that makes the provision superfluous or meaningless.

The no cut-back provision is actually very easy to implement. One need only apply the formula in paragraph

3.1, plugging in the dates and salaries of the terminated employee. Thus, the plain meaning of the no cut-back provision is to prevent the reduction or elimination of severance benefits upon the passing of a Plan amendment. However, the Defendants' arguments do not completely win the day.

The Court cannot accept the Defendants' assertion that the release requirement is merely a condition precedent which does not eliminate or reduce severance benefits. Defendants' interpretation of the Amendment would work a forfeiture of benefits upon the Plaintiff. "As a general principle, employee benefit plans should not be interpreted in such a way as to produce a forfeiture." Brown v. Blue Cross and Blue Shield of Ala., 898 F.2d 1556, 1569 (11th Cir. 1990) (citing Helms v. Monsanto Co., 728 F.2d 1416, 1420(11th Cir. 1984) ("Congress wanted to assure that those who participate in the plans actually receive the benefits they are entitled to and do not lose these as a result of unduly restrictive provisions or lack of sufficient funds.")). Likewise, under contract principles, where an ambiguity exists, the contract is to be construed against the party who drafted it. In this case, the company drafted the Plan, thus the Plan should be interpreted against it. See Bonor v. Bamett Bank, 488 F.Supp. 365, 369 (M.D. Fla. 1980) (employer unilaterally established plan to encourage continued employment through the promise of benefits, so terms should be construed in favor of employees to whom promises are made).

Defendants have shown the Court that the company, as the drafter of the Plan, "knew how to provide for vesting when it wanted to." Indeed, the record shows that the company had legal counsel to assist it with Plan-related matters. As such, the Court assumes that the company, as drafter of the Amendment, knew what it was doing when the

Amendment was placed within Article 3: Benefits. If the company had meant the Amendment to impose a condition precedent like those in Article 2: Eligibility, the company would have put it there. Instead, the company put the Amendment where it belonged. The Amendment affects the amount of benefits a participant may receive. It says that a participant will comply with this requirement or the benefits will be eliminated. This works a reduction or elimination of benefits under the no cut-back provision of the Plan. As such, the Amendment is a "Prohibited Amendment" under the terms of the Plan and is thus void.

**B. Violations of the Plan's Amendment Procedure**

As an alternative ground for its decision, the Court will consider the Plaintiffs additional argument against the validity of the Amendment. In this argument, the Plaintiff asserts that, even if the no cut-back provision of the Plan was not violated, the company still failed to amend the Plan according to the amendment procedures as set forth in the Plan.

It is axiomatic that, absent limiting provisions in the plan, a company may alter, amend, or even terminate a welfare benefit plan at will. See Curtiss-Wright Corp. v. Schoonejongen, 514 U.S. 73, 115 S.Ct. 1223, 131 L.Ed.2d 94(1995); Lockheed Corp. v. Spink, *517* U.S. 882, 116 S.Ct. 1783, 116 S.Ct. 1793 (1996); Inter-modal Rail Employees Assoc. v. Atchison, Topeka and Santa Fe Ry. Co., 520 U.S. 510, 117 S.Ct. 1513, 137 L.Ed.2d 763 (1997). However, once a plan sponsor contractually cedes its right to alter the plan at will, the company will be bound by the terms of the welfare plan. ERISA follows standard trust law principles in requiring that a company be bound to whatever level of specificity a company chooses in the amendment procedures set forth in ERISA plans, whether they be pension or welfare

plans. See Curtis-Wright, 514 U.S. at 85, 115 S.Ct. at 1223.

From the record in this case, it appears that Barnett failed to follow the amendment procedures set forth in the Plan. The Plan had to be amended before the change in control in order to prevent the vesting of severance benefits. Therefore, when NationsBank told Barnett to add the Amendment to the Plan, Barnett quickly included the resolution on the agenda for the last Board of Directors meeting. The record fails to show that the Plan was consulted in any effort to abide by its amendment procedures. Moreover, Barnett failed to follow notification procedures. Employees never received a copy of the new Amendment, even though Barnett and NationsBank knew that a significant number of employees were going to be terminated as a result of the merger. Additionally, neither the Plan nor the plan summary was modified to reflect the new Amendment, which a statutory request by the Plaintiff as late as May 1998 demonstrates. The Court thus finds that ERISA has been violated.

Defendants claim, however, that the procedural violations do not matter as long as the Barnett Banks, Inc. Board of Directors passed the Amendment. Defendants claim that adoption of the Amendment by the Board cured any procedural error, and the Executive Benefits Committee members who were at the Board meeting effectively ratified the amendment. This argument ignores established Supreme Court precedent. "An employer may, of course, retain the unfettered right to alter its promises, but to do so it must follow the formal procedures set forth in the plan." See Inter-modal Rail Employees Assoc., 520 U.S. at 515-516. To allow the Board to amend the plan, or to allow the "ratification" of the amendment merely because some members of the Executive Benefits Committee attended the Board meeting, would rob the rule of its purpose. There would be no point in

having amendment procedures in the Plan if the company could circumvent them so easily.

Defendants also claim that the utter disregard for the Plan's provisions is a "technical" violation that does not affect the validity of the Amendment. According to Defendants, once a procedural violation is shown, the Plaintiff must still show either active concealment, detrimental reliance or prejudice. In support of this argument, the Defendants cite to various cases. See Aldridge v. Lily-Tulip, Inc. Salary Retirement Plan Benefits Committee, 40 F.3d 1202 (11th Cir. 1994) (holding that an amendment to a plan is not void solely because the plan failed to set forth amendment procedures in violation of ERISA, but could be void if the plaintiff shows detrimental reliance on the plan's failure to set forth amendment procedures); Branch v. G. Bernd Co., 955 F.2d 1574, 1579 (11th Cir. 1992) (holding that in order to prevent an employer from enforcing the terms of a plan that are inconsistent with those of the plan summary, a beneficiary must prove reliance on the summary).

The case of Alford v. Kimberly-Clark Tissue Co., 14 F.Supp.2d 1290 (S.D. Ala. 1998), is illustrative of this argument. In that case, the Alabama court was confronted with a situation remarkably similar to the present one. The Alford court found that the company had violated the written termination procedure set forth in the plan. Id. at 1298. The Court agreed with the defendant and held that the procedural violation did not void the termination of the plan absent a showing of active concealment, detrimental reliance, or bad faith. Id. at 1299. The Alford court noted that the Eleventh Circuit has favored just such an approach because it "serves the dual purpose of protecting the rights of beneficiaries in the plan while allowing flexibility to the plans to grow or diminish at any time, as allowed by law." Id.

The Court agrees with the case law cited by the Alford court, as well as the policy behind a reliance requirement. Thus, in the present case, the Court finds that the gross procedural violations will not void the Amendment unless the Plaintiff has shown in the record active concealment, detrimental reliance, or bad faith. The Court believes that the record establishes some of these factors.

First, the Court believes that the record is not clear on whether Barnett engaged in active concealment. Defendants, of course, argue that the facts do not support it, while Plaintiff did not argue this issue in his summary judgment motions or in his opposition to Defendants' cross-motion for summary judgment. Nevertheless, the record shows a factual question on whether such concealment took place.

A reasonable question exists as to whether it is equitable to make a plaintiff prove detrimental reliance on a provision which does not appear in the plan or summary. However, a beneficiary who receives a plan or summary which omits a provision could prove reliance with evidence that the beneficiary received and read the plan and summary on the belief that there was no other limitation to the terms of the plan. See Branch, 955 F.2d at 1579, n.2. On the record before it in this case, the Court is unable to determine with reasonable certainty whether Plaintiff detrimentally relied on the Amendment.

The facts, however, as set forth in the record of this case, demonstrate that there is no genuine issue as to whether there was bad faith on the part of Barnett and its successors. Prior to November 19, 1997, the Severance Plan did not require a general release before the receipt of benefits. The Plan did, however, specifically provide that severance benefits would vest if there was a change in control. The Plan

also specifically prevents an acquiring company from changing the terms of the Plan or terminating the Plan for two years after a change in control. The record shows that these provisions were added to the Plan in order to protect Barnett employees from a new company acquiring Barnett and then refusing to honor the severance benefits as set forth in the Plan.

After the merger agreement was signed on August 27, 1997, NationsBank wanted to change the terms of the Severance Plan. As an acquiring company, it would not be able to do so for two years. The record unequivocally establishes that, after the merger, NationsBank and Barnett knew which positions would be terminated and which employees would lose their jobs as a result of the merger. NationsBank wanted to require a release to prevent specific people from pursuing claims against NationsBank, thus saving it substantial sums of money. The record also establishes that, in November of 1997, NationsBank told Barnett to add a general release requirement to the Plan before the last Board meeting. NationsBank knew, as did the Barnett Board of Directors, that this would be the last opportunity to amend the Plan for the next two years. NationsBank was able to order Barnett to do what, by itself, it could not. In so doing, Barnett and NationsBank violated, if not the letter, then surely the spirit of the Plan provisions and ERISA.

Barnett, in its hurry to do NationsBank's bidding, failed to even consult the Plan's amendment procedures. Then, after Barnett, Inc. was dissolved into NB Holdings, NationsBank began administering the Plan with obvious disregard of the Plan procedures. Even if the NationsBank Committee were found to have the proper authority to determine claims, it wholly failed to follow the Plan procedures. For example, once the NationsBank Committee

denied Plaintiff's claim, he was also summarily denied his appeal.

ERISA was designed to prevent the type of usurpation of benefits which occurred in this situation. While it is true that ERISA provides greater protection to pension benefits than welfare benefits, that does not mean there was no intent to protect beneficiaries of welfare plans at all. If anything, the more lenient treatment of plan sponsors and the free ability to amend plans as they wish furnish even more reason for a court to insist that a company follow the welfare plan's amendment procedures when the company has set them out in writing. Moreover, the undisputed record shows a concerted effort by Barnett and NationsBank to circumvent the provisions of the Plan.

ERISA requires that a plan contain a procedure for amending the plan. Curtiss-Wright made clear that a plan sponsor may fulfill that ERISA requirement by simply stating that the plan could be amended "by the company." But, once the company decides to lay down a more complex procedure for amending the plan, it is bound to that decision. The utter disregard which Barnett showed toward the plan shows that the Plan Amendment was conceived, approved, and later administered with bad faith.

## V. Applying the Arbitrary and Capricious Standard

Having determined the correct legal interpretation of the 3.10 Release Requirement, the Court finds that this interpretation is different from the conclusion reached by the NationsBank Committee. Therefore, the Court must now move to the second prong of the heightened arbitrary and capricious standard. To determine whether the NationsBank Committee's conclusion is arbitrary and capricious, the Court must look to see if the NationsBank Committee's conclusion

was for the benefit of the Plan's beneficiaries. Brown, 898 F.2d at 1566 ("a wrong but apparently reasonable interpretation is arbitrary and capricious if it advances the conflicting interest of the fiduciary at the expense of the affected beneficiary or beneficiaries unless the fiduciary justifies the interpretation on the ground of its benefit to the class of all participants and beneficiaries").

Regarding the interpretation of the no cut-back provision, the Defendants never made an argument that the NationsBank Committee's interpretation, allowing the Amendment, would benefit the class of all participants and beneficiaries. The Court notes that the only possible justification for validating the Amendment would be to ensure the financial integrity of NationsBank, and thus benefit the Plan and its beneficiaries. However, the Eleventh Circuit has noted that in the case where decisions are made .by the same company paying the claims, "adverse benefits determinations save considerable sums that are returned to the fiduciary's corporate coffers. The presumption that the fiduciary is acting for the future stability of the fund cannot be entertained." Brown, 898 F.2d at 1568.

Therefore, the Court finds the NationsBank Committee's interpretation of the Amendment and the Plan to be arbitrary and capricious. The Court further finds that, since the NationsBank Committee's action regarding the Amendment was arbitrary and capricious, its determination on the Amendment cannot stand. The Court finds that the Amendment violated the clear terms of the no cut-back provision of the Plan by its retroactive application. However, the Court is not of the view that the Amendment would be completely void because of its conflict with the no cut-back provision. If the Court were to hold the Amendment void, that would mean that the Company included a provision in the Plan which would entirely prevent any downward

revision of the Plan. The Court is confident that the company did not intend such a reading. Therefore, the Amendment will be held invalid insofar as it attempts to deny benefits earned before November 19, 1997. No release would be required to receive benefits earned before this date. However, the Court holds the Amendment valid for those benefits earned on or after November 19, 1997, and a release could be required to receive such benefits.

Addressing the Plaintiffs second argument, the Court finds that the Amendment was not passed in conformity with the amendment procedures set forth in the Plan, and this non-conformity was due to bad faith and prejudiced Plaintiff. The NationsBank Committee knew that Plaintiff claimed a right to not sign a release. The NationsBank Committee, therefore, had a fiduciary duty toward the Plaintiff to investigate this claim. Notwithstanding this duty, the NationsBank Committee meeting minutes do not reflect any discussion or interpretation of the Plan. Thus, the NationsBank Committee's interpretation of the Amendment and the Plan was arbitrary and capricious. The Court concludes the failure to follow the Plan's amendment procedures voids the Amendment. The Amendment, thus, is deemed inapplicable to Plaintiff. Plaintiff is entitled to summary judgment.

The parties do not appear to dispute that the amount of severance benefits owed to Plaintiff for his period of employment from September 13, 1982, through January 31, 1998, is $110,347.43. See Plaintiff's Motion for Summary Judgment (Dkt. 3 at 10) and Defendants' Response in Opposition to Plaintiff's Motion for Summary Judgment and Cross-Motion for Summary Judgment (Dkt. 19 at 9). Accordingly, the Court finds that Plaintiff is entitled to severance benefits in the amount of $110,347.43. With respect to prejudgment interest, the Court agrees with Plaintiff that such an award should be made in this case. See

Smith v. American International Life Assurance Company of New York, 50 F.3d 956, 958 (11th Cir. 1995). On the record before it, however, the Court cannot make a reasonable determination as to the appropriate amount of such an award. Accordingly, it will direct the Plaintiff to submit a brief memorandum addressing the appropriate prejudgment interest rate to be applied and calculating the total amount of prejudgment interest due him.

Moreover, the Court has considered the five factors set forth in Florence Nightingale Nursing Service. Inc. v. Blue Cross/Blue Shield of Alabama, 41 F.3d 1476, 1485 (11th 1995), and finds that, based on the relative merits of the parties' positions, the degree of Defendants' bad faith in seeking to improperly amend the Plan, Defendants' ability to satisfy an award of attorney's fees, and the likelihood that the award of attorneys' fees might deter others from attempting to amend plans without observing plan procedures, the Court will grant Plaintiff's request for attorney's fees and costs. Further briefing on the amount of fees and costs will also be directed.

Upon consideration of the foregoing, it is hereby **ORDERED**:

1. Plaintiff's Motion for Summary Judgment (Dkt. 3) and Motion for Summary Judgment on the Basis that the Purported Section 3.10 Amendment was not Properly Adopted and Made Available (Dkt. 68) are **GRANTED**.

2. Defendants' Cross Motion for Summary Judgment (Dkt. 19) is **DENIED**.

3. All other pending motions, if any, are **denied as moot**.

4. The Clerk is **directed** to enter judgment in favor of

Plaintiff and against the Defendants for severance benefits in the amount of $110,347.43, plus prejudgment interest, attorneys' fees and costs.

5. Plaintiff is **directed** to file with the Court, **on or before July 17, 2000**, a memorandum setting forth the amount of prejudgment interest, attorney's fees and costs sought along with supporting documentation. Defendants' response thereto shall be filed **on or before July 31,2000**. Counsel shall furnish the Court with one chambers copy of such submissions.

**DONE AND ORDERED**, at Jacksonville, Florida, this 28th day of June, 2000.

/s/ Ralph W. Nimmons, Jr.
RALPH W. NIMMONS, JR.
United States District Judge

Copies to:
Counsel of Record and Unrepresented Party, if any
Denise Seymour, Courtroom Deputy
Margaret Costa, Judicial Assistant

## Appendix C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 01-11858-EE

JAMES E. LOSKILL,

Plaintiff-Appellee,

versus

BARNETT BANKS, INC. SEVERANCE PAY PLAN, THE BARNETT BANKS, INC. SEVERANCE PAY PLAN, NATIONSBANK CORPOATION CORPORATE BENEFITS COMMITTEE, NATIONSBANK BENEFITS APPEALS COMMITTEE,

Defendants-Appellants.

On Appeal from the United States District Court
for the Middle District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: WILSON, RONEY, FAY, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) fro Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Charles Wilson
UNITED STATES CIRCUIT JUDGE

FILED U.S. COURT OF APPEALS ELEVENTH CIRCUIT
JUN 19 2002
THOMAS K. KAHN CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 01-11858-EE

JAMES E. LOSKILL,

Plaintiff-Appellee,

versus

BARNETT BANKS, INC. SEVERANCE PAY PLAN, THE BARNETT BANKS, INC. SEVERANCE PAY PLAN, NATIONSBANK CORPOATION CORPORATE BENEFITS COMMITTEE, NATIONSBANK BENEFITS APPEALS COMMITTEE,

Defendants-Appellants.

On Appeal from the United States District Court
for the Middle District of Florida

BEFORE: WILSON, RONEY, FAY, Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by the appellee, James E. Loskill, is DENIED.

ENTERED FOR THE COURT:

/s/ Charles Wilson
UNITED STATES CIRCUIT JUDGE

FILED U.S. COURT OF APPEALS ELEVENTH CIRCUIT
JUN 19 2002
THOMAS K. KAHN CLERK

DEC 18 2002

No. 02-347

IN THE

# Supreme Court of the United States

JAMES E. LOSKILL,

*Petitioner,*

*v.*

BARNETT BANKS, INC. SEVERANCE PAY PLAN, EMPLOYEE BENEFITS COMMITTEE OF THE BARNETT BANKS, INC. SEVERANCE PAY PLAN, NATIONSBANK CORPORATION CORPORATE BENEFITS COMMITTEE, and NATIONSBANK BENEFITS APPEALS COMMITTEE,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

## BRIEF OF RESPONDENTS IN OPPOSITION

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## CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondents in this action are Barnett Banks, Inc. Severance Pay Plan, Employee Benefits Committee of the Barnett Banks, Inc. Severance Pay Plan, NationsBank Corporation Corporate Benefits Committee, and NationsBank Benefits Appeals Committee. Bank of America Corporation, a publicly traded corporation, is a related entity. None of the respondents has a parent corporation and no publicly traded corporation owns 10 percent or more of the stock of any such respondent.

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## STATEMENT OF THE CASE

### I. Nature of the case

This action arises from a November 19, 1997 amendment to the Barnett Banks, Inc. Severance Pay Plan (the "Plan"). On that date, Barnett's Board of Directors approved a Plan amendment that required employees to execute a release of certain claims as a precondition to receiving certain severance benefits under the Plan (the "release amendment"). Releases of this type, as petitioner does not and cannot dispute, are common in ERISA-governed severance plans. After four years of litigation, however, petitioner now argues—for the first time in this Court—that the release amendment is invalid because the lower courts incorrectly required a showing of "bad faith, active concealment or detrimental reliance" before a mere technical violation of the Plan's amendment procedures results in invalidation of the Plan amendment.

The petition pointedly fails to disclose that petitioner failed to raise this "bad faith" issue in the district court, then failed again to raise it in the court of appeals, *i.e.*, petitioner never before disputed that such "bad faith" must be shown before a technical procedural violation invalidates a plan amendment. It is likewise clear (and likewise obscured in the petition) that: (i) there is no basis in the burgeoning body of ERISA case law to impose liability in circumstances such as those presented here, where—even assuming a technical violation of a plan's amendment procedure—there has been no showing whatsoever of bad faith, active concealment or detrimental reliance in connection with a plan amendment, and (ii) there is no division of authority in any of the lower courts with respect to the governing rule of law. Indeed, as

the Eleventh Circuit observed below, the general and well-established rule is that "courts typically will not invalidate an amendment for technical violations of a plan's procedures absent a showing of bad faith or active concealment on the part of the sponsor, or detrimental reliance on the part of the beneficiaries." App. 7 (citing cases). Moreover, as explained *infra*, the factual predicate of this claim—that the release amendment was not adopted in conformity with Plan amendment procedures—is untrue as a factual matter, was not established in the decision below, and is not now before this Court. Nonetheless, alleging that the release amendment was not adopted in strict conformity with the Plan's amendment procedures, petitioner now insists that the Barnett Board's plainly permissible action must be held invalid notwithstanding the complete absence of bad faith, active concealment or detrimental reliance.

Thus, the question petitioner would now present to this Court is not fairly presented on the facts or procedural posture of the case. As set forth below, the petition is an inappropriate candidate for this Court's review and should be denied.

## II. Statement of facts

The Plan was a Barnett-sponsored, ERISA-governed welfare benefit plan which provided that eligible employees were entitled to receive a cash benefit upon a qualifying termination of employment.

On August 29, 1997, Barnett entered into a merger agreement with NationsBank whereby Barnett shareholders would receive shares of NationsBank stock in exchange for their shares of Barnett stock. Shortly after the merger agreement was entered into, a NationsBank representative

suggested to a Barnett human resources official that Barnett consider adopting the release amendment. Executives in Barnett's human resources office considered the idea and decided that it was reasonable and consistent with Barnett's purposes for maintaining the Plan. The human resources staff therefore asked Barnett's corporate secretary to place a proposed release amendment on the agenda for consideration at the next meeting of the Barnett Board of Directors. App. 2.

Once on the Board agenda, the release amendment was directed to the Board subcommittee with responsibility for employee benefits issues—the Executive Compensation and Management Development Committee. Upon deliberation on November 19, 1997, this committee recommended approval of the release amendment by the full Board. App. 3. Later that same day, after determining that it made good business sense, the Board adopted the release amendment which provides:

> Notwithstanding any provision of the Plan to the contrary, Severance Benefits shall not be paid to an employee unless and until the Employee delivers a full release to his Employers of all employment-related claims, including all rights and claims under the Age Discrimination in Employment Act of 1967, as amended ("ADEA").

App. 3. The NationsBank merger was approved by the Barnett shareholders on December 19, 1997, and was consummated on January 9, 1998. App. 2.

Petitioner Loskill was the President of Barnett Bank, N.A., Pinellas County, a wholly-owned subsidiary of Barnett. Loskill's employment was terminated following the merger. In connection with his termination, and in addition to a $600,000 payment Loskill received pursuant to his employment agreement (and $2.1 million in supplemental benefits Loskill had received at the time of the merger), NationsBank advised him that he would be entitled to $110,000 in severance benefits under the Plan if he executed a release. Loskill declined to sign a release and instead filed a formal claim for benefits with the Plan administrator on July 31, 1998. After receiving and considering submissions from Loskill's attorney, the NationsBank Benefits Appeals Committee denied Loskill's claim, finding that he would be entitled to the $110,000 in benefits only if he executed a release. App. 3.

## III. Course of the proceedings below

On October 6, 1998, petitioner commenced this action against the Plan in the United States District Court for the Middle District of Florida. The complaint, as amended, alleged that (i) the release amendment violated the Plan's No Cut Back provision[1] and (ii) the release amendment was invalid because it was not adopted in accordance with the amendment procedures set forth in the Plan. App. 4.

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[1] The Plan's No Cut Back provision (§ 4.1(b)) reads as follows:

> No amendment will eliminate or reduce any Employee's right to Severance Benefits accrued before the effective date of the amendment, to an amount less than the amount he would have received if he had a Qualified Termination the day before the effective date of the amendment.

The parties cross-moved for summary judgment, and, by order dated June 28, 2000, the district court granted summary judgment in petitioner's favor on two distinct theories. First, the court held that in light of the Plan's No Cut Back provision, the release amendment could not apply to severance benefits accrued prior to November 19, 1997, the date the amendment was adopted. App. 27.

Second, the district court concluded that the procedure by which the Barnett Board adopted the release amendment violated the Plan's amendment provision. App. 30. The court recognized, however, that a technical violation of the amendment provision could not, as a matter of settled law, operate to void the release amendment unless petitioner could also show *active concealment, detrimental reliance, or bad faith*. App. 31-32. Petitioner had never alleged—not in his Complaint, not in his summary judgment briefs, not anywhere else—the existence of active concealment, detrimental reliance or bad faith. Nonetheless, the district court found, *sua sponte*, that Barnett had acted in bad faith and that the release amendment was thus entirely void. App. 33.

Defendants appealed. In an Opinion and Order dated April 25, 2002, a panel of the Eleventh Circuit reversed both district court holdings. With respect to petitioner's No Cut Back claim, the Court of Appeals relied on this Court's decisions in *Curtiss-Wright Corp.* v. *Schoonejongen*, 514 U.S. 73 (1995) and *Lockheed Corp.* v. *Spink*, 517 U.S. 882 (1996), to find that the release amendment was a condition precedent to benefits, and not a benefit cut-back. App. 6. Petitioner has now abandoned this claim and it is not presented upon the instant petition.

With respect to petitioner's claim that the release amendment violated the Plan's amendment procedures, both sides accepted on appeal that the amendment was valid even if adopted in technical violation of the plan's amendment procedures unless adopted in bad faith. Petitioner never disputed this point. The Eleventh Circuit held that the record contained no evidence to support the district court's finding that Barnett undertook the amendment in bad faith. Because the parties had effectively conceded that liability on the amendment procedure claim required a showing of bad faith—both accepted the bad faith standard as the operative legal rule—the Eleventh Circuit ended its analysis with its finding that bad faith could not be found on the existing record. The court thus declined to decide whether there had been a technical violation of the amendment procedure. App. 8-9.

It is for this reason that the appellate decision discloses no dispute and indeed no analysis with respect to the legal point petitioner would now bring to this Court: whether bad faith, active concealment or detrimental reliance is a necessary predicate to ERISA liability where there has been a technical violation of plan amendment procedures. Petitioner simply conceded this issue in the Eleventh Circuit.[2]

In dissent, Judge Rooney concluded that the district court's No Cut Back ruling should be affirmed. App. 10.

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[2] The appeals court did, however, observe that the compensation committee members and board members who considered, recommended and implemented the release amendment believed they were operating within the Plan's procedural requirements and would not have approved the amendment if they had not believed that they had the authority to do so. App. 9 & n.4.

Recognizing that this conclusion would dispose of the case, Judge Rooney declined to address the merits of petitioner's Plan amendment claim. App. 10. The dissent nevertheless suggested that the decision below was the first appellate decision to conclude that bad faith, active concealment or detrimental reliance was necessary to create liability for a technical violation of plan amendment procedures, but noted that the bad faith aspect of the opinion below was in accord with multiple and consistent district court rulings. App. 11-12. The dissent did not suggest any conflict on the point with any other ruling, appellate or otherwise; to the contrary, the dissent recognized that the majority view on the bad faith issue was in accord with an existing body of closely analogous caselaw. App. 12. Petitioner then sought panel rehearing and petitioned the Eleventh Circuit for rehearing en banc, which petitions were denied by orders dated June 19, 2002. App. 39-40.

## REASONS FOR DENYING THE PETITION

Petitioner's argument—that technical violations of plan amendment procedures should create ERISA liability, even absent any showing of bad faith or active concealment on the part of the plan sponsor, or detrimental reliance on the part of the beneficiary—was never presented to or addressed by the court below. By repetitiously citing this Court's recent decisions in *Curtiss-Wright* and *Inter-Modal Rail Employees Ass'n* v. *Atchison, Topeka and Santa Fe Ry. Co.*, 520 U.S. 510 (1997)—which do not control the facts here and which, at any rate, are entirely consistent with the disposition below—petitioner attempts to create the illusion that the Eleventh Circuit failed to respect this Court's recent ERISA precedent. And by selectively and misleadingly citing various lower court authorities, petitioner attempts to portray the

lower courts as somehow divided with respect to the "bad faith" requirement for liability in cases of technical violations of plan amendment procedures.

But the reality of the matter is entirely otherwise. The petition should be barred at the threshold because petitioner never raised below the question he now purports to present. Moreover, the decision below is not only plainly correct, but it relies largely on, and interprets with entire fidelity, this Court's teaching in *Curtiss-Wright* and *Inter-Modal*. And notwithstanding petitioner's attempt to muddy the decisional waters, there is a *uniform* line of court of appeals and district court authority affirming that mere technical violations of amendment procedures, without a showing of bad faith, are insufficient to give rise to ERISA liability. There was no dissent from the panel ruling below on the issue petitioner now presses, no vote in favor of panel rehearing or rehearing en banc, and there is no countervailing authority anywhere. Review by this Court is unwarranted.

## I. The question petitioner presents was never raised or briefed below.

Petitioner asks this Court to consider whether "the requirement that a participant establish bad faith, active concealment or detrimental reliance before invalidating an amendment to an ERISA welfare benefit plan . . . adopted in violation of the amendment procedures required by the plan" is consistent with ERISA § 402(b)(3) as interpreted by this Court's controlling case law. Pet. for Cert. at i. Because petitioner never raised this question below, the issue is waived and is not preserved for certiorari review.

In the district court, petitioner *never suggested* that ERISA liability for a technical violation of plan amendment procedures should attach absent a showing of bad faith. The district court, relying on a solid wall of caselaw, reached the unremarkable conclusion that such a showing was indeed prerequisite to the relief petitioner seeks. App. 31-32.

In the court of appeals, petitioner likewise never argued that a technical violation of plan amendment procedures could create ERISA liability absent a showing of bad faith. To the contrary, in his briefing to the Eleventh Circuit, petitioner exclusively chose to defend the lower court's finding that Barnett had acted in bad faith—thereby acknowledging the correct legal standard—and never once even so much as suggested that the district court's "bad faith" holding was not a correct statement of the law. *Cf. Heller* v. *Doe*, 509 U.S. 312, 319 (1993) (rejecting an argument for a heightened standard of review where the "parties [had] been litigating [the] case for years on the theory of rational-basis review, . . . [and thus] [i]t would [have] be[en] imprudent and unfair to inject a new standard at this stage in the litigation"); *United States* v. *Ortiz*, 422 U.S. 891, 898 (1975) (declining to consider petitioner's argument in favor of a particular legal standard where the contention had not been raised below and where, to the contrary, petitioner had represented to the court of appeals that a different legal standard would be "determinative of the issues in [the] case") (internal quotation marks omitted). Respondent, too, recognized the "bad faith" requirement as an appropriate statement of the law, and demonstrated through its briefing that no record evidence existed to support the district court's bad faith finding. Because the point dooms the instant petition, it merits emphasis: *in the court of appeals, the parties agreed that a showing of bad faith was required for*

*ERISA liability and therefore never briefed the legal question that petitioner now presents; in consequence, the court of appeals decision contains no dilation on the point whatsoever.*

That the "bad faith" question was undisputed below is clearly reflected in the Eleventh Circuit's decision. The opinion does not evaluate either the "bad faith" standard or the district court's determination to review the disputed Plan amendment for "bad faith," and certainly never passes upon a legal standard that had been effectively conceded. Rather, the Court of Appeals took the "bad faith" inquiry as a given—precisely because the litigants presented it as a given—and observed only the undisputed point that "courts typically will not invalidate an amendment for technical violations of a plan's procedures absent a showing of bad faith or active concealment on the part of the sponsor or detrimental reliance on the part of the beneficiaries." App. 7 (citing cases). Indeed, the court below relied on this conceded legal standard to avoid deciding the logically subsequent (and sharply contested) question whether the release amendment was implemented in accordance with the amendment provision. The Eleventh Circuit reasoned that this question—whether the amendment provision had in fact been violated—could not affect the outcome of the case in view of the lack of evidence supporting a bad faith finding under the unchallenged bad faith standard.[3]

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[3] The Eleventh Circuit therefore declined to address the very substantial evidence and arguments respondents presented to show that the amendments were adopted in accord with Plan amendment provisions. *See infra*.

Now, having lost on the *facts* below, petitioner would have this Court reconsider the *law* he has conceded throughout the litigation. Review under these circumstances is barred by this Court's "traditional rule . . . preclud[ing] a grant of certiorari . . . when the question presented was not pressed or passed upon below." *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (internal quotation marks omitted); *see FW/PBS, Inc.* v. *City of Dallas*, 493 U.S. 215, 224 (1990). The question presented is plainly unpreserved under this standard. Below, petitioner never questioned—not once—the "bad faith" standard he would now bring to the Court. And the Eleventh Circuit, far from "passing upon" the bad faith standard, simply accepted it as the law, relying on the concession of the parties. The treatment of the issue below falls far short of the requirement that "the Court of Appeals expressly rule[]" on a question pressed for the first time in this Court. *Williams*, 504 U.S. at 42; *cf. Furnco Constr. Co.* v. *Waters*, 438 U.S. 567, 580-81 (1978). This petition presents a simple circumstance "in which, after losing in the Court of Appeals, [petitioner] reversed its position"—a circumstance which plainly precludes Supreme Court review. *Williams*, 504 U.S. at 43.

The prudential concerns that animate this Court's salutary waiver rule are fully implicated here. Review of the question petitioner purports to present would undermine the assumption, basic to this Court's certiorari rules and to our system of justice, that the adversary process provides the best means for arriving at correct decisions. In order to preserve this process, the rules of appellate practice—which operate not only at this Court, but in appellate tribunals throughout the federal and state judiciaries—require that an issue be actually raised and debated by the parties below if it is to be preserved for later review. Petitioner has opportunistically

failed to honor this elementary principle, with the result that the question he brings to this Court has not benefited from briefing, argument, and judicial reflection below.

Review of this question now would not only do violence to principles of appellate practice, but it would unfairly prejudice respondents as well. Respondents, like the lower courts, have answered every legal and factual theory petitioner has devised throughout this four-year litigation. These theories have been found wanting by the Eleventh Circuit. Now, petitioner wishes to change direction by foisting upon this Court a question never before raised—and which very likely cannot be presented on the facts of this case. *See infra*. This is unfair surprise of the most basic sort and should not be countenanced by this Court. *See Hormel* v. *Helvering*, 312 U.S. 552, 556 (1941) (the rule that "an appellate court does not give consideration to issues not raised below" is necessary to protect litigants from being "surprised on appeal").

**II. There is no conflict with any decision of this Court.**

The principal argument petitioner offers in support of the petition is his claim that the Eleventh Circuit decision conflicts with this Court's holdings in *Curtiss-Wright Corp.* v. *Schoonejongen*, 514 U.S. 73 (1995) and *Inter-Modal Rail Employees Ass'n* v. *Atchison, Topeka and Santa Fe Ry. Co.*, 520 U.S. 510 (1997). In actuality, there is no conflict with either decision.

### A. *Curtiss-Wright.*

Petitioner's marquee argument is that the Eleventh Circuit decision somehow conflicts with this Court's *Curtiss-Wright* decision. Pet. for Cert. 8-14. Even leaving to the side the fact that the decision below repeatedly cites and relies on *Curtiss-Wright* to undergird its analysis, App. 5-7, the argument is implausible on its face. The question presented in *Curtiss-Wright* was "whether a plan provision stating that [t]he Company reserves the right to amend the plan states a valid amendment procedure under § 402(b)(3)" of ERISA, which requires that ERISA plans provide "a procedure for amending such plan, and for identifying the persons who have authority to amend the plan." 514 U.S. at 75, 78; *see* 29 U.S.C. § 1102(b)(3). The Court held that general amendment provisions placing amendment power with "the Company" satisfy § 402(b)(3), rejecting the view that ERISA required a more detailed amendment procedure. 514 U.S. at 81-84.

*Curtiss-Wright* cannot possibly control this case or conflict with its disposition. There is no plausible suggestion here that the plan did not contain satisfactory amendment procedures in violation of § 402(b)(3)—indeed, the whole theory of petitioner's case is that the plan *did* contain satisfactory amendment procedures, but that they were not formally followed in every technical respect. Petitioner's lengthy quotations of *Curtiss-Wright* with respect to the need for amendment procedures are doubtless correct statements of the law, but they have no bearing on this case. There is simply no dispute that the Plan contained satisfactory amendment procedures, and there is and can be no claim that the Plan violates § 402(b)(3). Petitioner's assertion that the decision below somehow "conflicts" with *Curtiss-Wright* blinks reality.

*Curtiss-Wright* left open the question whether plan amendments should be treated as void *ab initio* whenever a plan is found not to have an acceptable amendment procedure in violation of § 402(b)(3). *See Curtiss-Wright*, 514 U.S. at 85 ("Having determined that the Curtiss-Wright plan satisfies § 402(b)(3), we do not reach the question of the proper remedy for a § 402(b)(3) violation."). This issue is irrelevant to the instant petition. Indeed, the question the Court bypassed in *Curtiss-Wright* is a different question than petitioner purports to present: *Curtiss-Wright* left open the issue of the proper remedy for § 402(b)(3) violations, but this case does not even allegedly involve a § 402(b)(3) violation. Moreover, the Court *declined* to reach the remedy question in *Curtiss-Wright*; its decision *not* to reach the issue precludes petitioner's claim that the decision below conflicts with this Court's authority.

Finally, even if the question left open in *Curtiss-Wright* were somehow presented upon this petition—which it is not—that question is now a manifestly unsuitable candidate for certiorari. Since *Curtiss-Wright* was decided, a broad and firm consensus has developed among the courts of appeals regarding the proper remedy when a plan entirely lacking an amendment procedure attempts an amendment: the circuits now uniformly hold that such amendments may be invalidated only upon a showing of bad faith, active concealment, or detrimental reliance. *See, e.g.*, *Murphy* v. *Keystone Steel & Wire Co.*, 61 F.3d 560, 569 (7th Cir. 1995) ("technical violations of ERISA requirements do not justify relief absent a showing of bad faith, active concealment, or detrimental reliance"); *Adams* v. *Avondale Indus., Inc.*, 905 F.2d 943, 949 (6th Cir. 1990); *Aldridge* v. *Lily-Tulip, Inc. Salary Retirement Plan Benefits Committee*, 40 F.3d 1202, 1211 (11th Cir. 1994). Even the Third Circuit—which, in

the *Curtiss-Wright* opinion later overturned by this Court, had suggested that until an amendment procedure is adopted pursuant to § 402(b)(3), plan amendments are invalid—has reversed course, and now, along with the rest of the circuits, requires bad faith, active concealment, or some "substantive harm" to the beneficiary before a technical violation can create substantive liability. *See Ackerman* v. *Warnaco*, 55 F.3d 117, 124-25 & n.8 (3d Cir. 1995); *Lettrich* v. *J.C. Penney Co.*, 213 F.3d 765, 771 (3d Cir. 2000). Unanimously, these courts have reached the common-sense conclusion that "§ 1102(b)(3) [*i.e.*, ERISA § 402(b)(3)] allows recovery only where a breach of the provision has produced the harm that § 1102(b)(3) seeks to prevent: defeating an employee's legitimate expectation of benefits." *Murphy*, 61 F.3d at 569. Such uniformity in the lower court decisions plainly obviates the need for this Court's intervention.

At any rate, it bears reemphasis that the question left open in *Curtiss-Wright* is *not* the question petitioner purports to raise here. The question petitioner tries to raise—what remedy obtains when a plan with proper amendment procedures fails to follow them—has been less frequently litigated, but, as set forth *infra*, has yielded a similarly uniform body of decisions, all insisting on bad faith, active concealment, or detrimental reliance before ERISA liability will lie. And there is simply no basis whatsoever for petitioner's suggestion that this claim somehow conflicts with this Court's holding in *Curtiss-Wright*.

**B. *Inter-Modal.***

Petitioner also suggests that the decision below conflicts with this Court's opinion in *Inter-Modal*. Pet. for Cert. 11. In that case, the Court held that ERISA § 510, which makes

it unlawful to discharge an employee for the purpose of interfering with his or her ERISA benefits, applies to non-vested welfare benefits as well as to vested pension benefits. The *Inter-Modal* court emphasized that "employer[s] may, of course retain the unfettered right to alter its promises," but also noted that "to do so, it must follow the formal procedures set forth in the plan." 520 U.S. at 516. The Court there expressed the uncontested principle that formal plan procedures are to be followed to the extent they apply to plan action. But it did not even remotely address the proper remedy in the event such procedures are *not* followed in every technical respect, and certainly did not set forth the proposition that an amendment is necessarily and automatically invalid if it was not adopted in strict compliance with every technical procedure set out in the plan. The proof of this is in the uniform body of lower court authority, in both the § 402(b)(3) context, *supra*, and in the context of plans with amendment procedures, *infra*, which harmonize this Court's *Inter-Modal* decision with a bad faith standard for invalidation. In light of these considerations, there can be no plausible claim that the Eleventh Circuit's decision conflicted with this Court's teaching in *Inter-Modal*.

## III. There is no conflict of authority among the lower courts.

The petition also contends that the decision below conflicts with holdings of the Third and Seventh Circuits, which, petitioner claims, both "require[] that formal plan amendment procedures be followed in order to validly amend an ERISA plan." Pet. for Cert. 14-15. Petitioner simply misreads, or misrepresents, the relevant case law.

As to the Third Circuit, petitioner relies on *Ackerman* v. *Warnaco*, 55 F.3d 117 (1995). But *Ackerman*, like the Eleventh Circuit decision below, clearly *rejects* the view that any deviation from formal amendment procedures, without more, renders an amendment void *ab initio*. Rather, in *Ackerman*, the Third Circuit required that the plaintiff "demonstrate the presence of extraordinary circumstances" before relief (such as amendment invalidation) would be in order. 55 F.3d at 124. The court then explained that:

> Such [extraordinary] circumstances include situations where the employer has acted in bad faith, or has actively concealed a change in the benefit plan, and the covered employees have been substantively harmed by virtue of the employer's actions.

*Id.* at 125. Thus, there can be no question that, contrary to petitioner's assertion, the Third Circuit views bad faith, active concealment, or detrimental reliance (or some similar "extraordinary circumstance") as a precondition to ERISA liability, and that, accordingly, liability *cannot* attach for a mere technical violation of amendment procedure standing alone—just as per the Eleventh Circuit below. And to remove any conceivable doubt, the Third Circuit confirmed the active concealment, bad faith or detrimental reliance standard in *Lettrich* v. *J.C. Penney Co.*, 213 F.3d 765, 771 (3d Cir. 2000). The decision below is therefore entirely in accord with prevailing Third Circuit precedent. Petitioner's assertion to the contrary is baseless.

As to the Seventh Circuit, petitioner relies on *Albedyll* v. *Wisconsin Porcelain Co. Revised Retirement Plan*, 947 F.2d 246 (1991), to suggest a split in authority. But again,

plaintiff has misread the case. *Albedyll*, like the Eleventh Circuit decision below, clearly *rejects* the view that any deviation from formal amendment procedures, without more, renders an amendment void *ab initio*. Rather, liability in *Albedyll* was explicitly premised on a finding that "the participants were harmed by [the] violation [of amendment procedures]," and the Seventh Circuit affirmed the principle, endorsed in cases cited in *Albedyll*, that ERISA liability could not lie where "claimants had suffered no prejudice." *Id.* at 255. *Albedyll* is therefore entirely in accord with the decision below. And, here again, the Seventh Circuit has recently confirmed that technical violations, without more, will *not* void plan amendments: in *Murphy* v. *Keystone Steel & Wire*, *supra*, the court made clear that "technical violations of ERISA requirements do not justify relief absent a showing of bad faith, active concealment, or detrimental reliance," and that ERISA recovery will lie only where a technical violation "defeat[s] an employee's legitimate expectation of benefits." 61 F.3d at 569. Petitioner's claim of a circuit split is thus entirely without merit.

Here is the reality of the matter: there is no law anywhere to support petitioner's suggestion that a technical violation of a plan's amendment procedure requires invalidation of a plan amendment absent a showing of bad faith, active concealment, or detrimental reliance. Three district courts have passed upon the issue, and they agree that a showing of bad faith, active concealment or detrimental reliance is required. *See Alford* v. *Kimberly Clark Tissue Co.*, 14 F. Supp. 2d 1290, 1299 (S.D. Ala. 1998) ("[T]he court rejects the application of a per se invalidation rule . . . . [R]egardless of Scott Paper's failure to follow plan procedures in this case, the plan termination at issue must be considered valid absent a showing of active concealment, detrimental reliance, or

bad faith."); *Whitfield* v. *Torch Operating Co.*, 935 F. Supp. 822, 831 (E.D. La. 1996) (confirming "requirement that beneficiaries of a welfare benefit plan show active concealment, reliance to their detriment or substantial prejudice before a court may invalidate an amendment to a welfare benefit plan"); *Ross* v. *Rail Car America Group Disability Income Plan*, No. 8:99CV191, slip op. at 9 (D. Neb. June 15, 2000) ("Even if Canada Life had not amended the Policy in 1991 in the manner specified in the Policy's amendment provision, the amendment would still be valid because there is no evidence of bad faith, active concealment, or detrimental reliance that would justify granting [the claimant] a substantive remedy for any technical violation of the Policy's amendment provision."). And, as elaborated *supra*, every court of appeals to have considered the analogous issue of whether a plan amendment must be declared void simply because the plan did not conform with § 403(b)(3) now concludes that such an outcome is inappropriate absent a showing of bad faith, active concealment, or detrimental reliance.[4] There is no split of authority anywhere in the federal judiciary. And there is no question that the decision below is in complete accord with the unanimous position of the lower courts.

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[4] As petitioner points out, the district court in *Alford* did suggest that there was a split in authority, not on the issue purportedly presented here, but with respect to whether a § 403(b)(3) violation automatically rendered a plan amendment void. But the *Alford* court was reading bad law. It believed that the Third Circuit's *Curtiss-Wright* opinion, which was subsequently reversed by this Court, conflicted with "a larger number of courts" by concluding that failure to comply with § 403(b)(3) rendered any plan amendment ineffective. *See* 14 F. Supp. 2d at 1299. But (as elaborated *supra*) this aspect of the Third Circuit's *Curtiss-Wright* holding—while perhaps not expressly overruled by this Court—has clearly been abrogated by the precisely contrary reasoning and result in later Third Circuit cases, including *Ackerman* and *Lettrich*.

Petitioner claims to worry that the Eleventh Circuit decision portends a regime in which "Article III courts will now be required to develop a federal common law of bad faith, active concealment, and detrimental reliance to determine whether an amendment applies to a particular participant or beneficiary," thus undermining ERISA's goal of uniformity and certainty. Pet. at 12. The scenario petitioner frets about, however, doubles as a description of the current ERISA regime: bad faith, active concealment, and detrimental reliance *already play a prominent role* in the ERISA context, and those concepts have been created and informed by a well-developed common law in this area. See, for example, in the context of claims based on faulty summary plans, *Andersen* v. *Chrysler Corp.*, 99 F.3d 846, 859 (7th Cir. 1996) (requiring a showing of reliance, bad faith, or active concealment); *Aiken* v. *Policy Management Sys. Corp.*, 13 F.3d 138, 141 (4th Cir. 1993) (per curiam) (requiring a showing of reliance or prejudice); in the context of claims for breach of fiduciary duty under ERISA, *Daniels* v. *Thomas & Betts Corp.*, 263 F.3d 66, 73, 75 (3d Cir. 2001) (requiring a showing of detrimental reliance); *Adams* v. *Freedom Forge Corp.*, 204 F.3d 475, 492 (3d Cir. 2000) (same); in the context of equitable estoppel claims under ERISA, *Spink* v. *Lockheed Corp.*, 125 F.3d 1257, 1262 (9th Cir. 1997) (requiring a showing of detrimental reliance); *In re Unisys Corp. Retiree Medical Benefit ERISA Lit.*, 58 F.3d 896, 907 (3d Cir. 1995) (same); and in the context of technical violations of ERISA's reporting and disclosure provisions, *Watson* v. *Deaconess Waltham Hosp.*, 298 F.3d 102, 113 (1st Cir. 2002) (such violations generally do not give rise to substantive remedies outside § 1132(c) in the absence of exceptional circumstances, such as bad faith, active concealment, or fraud); *Panaras* v. *Liquid Carbonic Indus. Corp.*, 74 F.3d 786, 789 (7th Cir. 1996) (no remedy under § 1132(a)(1)(B) for such violations, absent exceptional circumstances such as bad faith, concealment, or induced

reliance). As courts in all of these situations (and others) have recognized, refusal to allow such principles to inform ERISA jurisprudence would result in inefficient or irrational results—incurable and unintended windfalls to beneficiaries or sponsors, depending on the context. In light of the pervasive and necessary presence of these concepts in the ERISA context, petitioner's concerns in this regard are misplaced. The decision below implicates no split of authority, and the petition should be denied.

## IV. The question presented cannot be raised on the facts of this case.

Additionally, it merits brief mention that the "bad faith" question petitioner presses on this Court is not properly raised on the facts of this case. The record evidence developed below made it crystal clear that the release amendment was adopted in complete conformity with the plan amendment provisions. The Plan's amendment provision begins with standard, unambiguous amendment language providing that "[t]he Company will have the right to amend the Plan from time to time." App. 7. Because a corporation necessarily acts through its directors, that provision is universally recognized as vesting in a corporation's board of directors complete authority to amend a plan. *See Curtiss-Wright*, 514 U.S. at 80. Thus, under the Plan's plain language, as well as this Court's precedent, the Plan amendment provision authorized the Barnett Board to amend the Plan. And it is undisputed that the Barnett Board *did* act, by proper board resolution, to amend the Plan at its November 19, 1997 meeting.

The question whether the Plan complied with its amendment procedures was extensively briefed in the Eleventh Circuit and argued strenuously before that court. Respondents do not raise the issue here in order to convince this Court of its merit: it is

evidently not the office of this Court to resolve disputed points of law and fact upon a petition for certiorari. The point, rather, is to emphasize that the "bad faith" issue petitioner purports to present rests on a logically prior factual predicate—that the release amendment was not adopted in accordance with the Plan amendment provisions—which is highly suspect and was powerfully contested below. The Eleventh Circuit ultimately declined to resolve whether the Plan amendment procedures had been followed, because the completely obvious lack of bad faith—and the concession by both parties that such bad faith was a precondition to invalidating the release amendment—gave the court an easier route to decision. But the rationale adopted below was the direct result of petitioner's strategic concession on the "bad faith" issue. Petitioner should not now be permitted to seek from this Court an effectively advisory opinion on a question which, but for petitioner's opportunistic litigating strategy, would very likely not lie at all.

## CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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(3)

No. 02-347

IN THE

SUPREME COURT OF THE UNITED STATES

James E. Loskill,
Petitioner

v.

Barnett Banks, Inc. Severance Pay Plan, Employee Benefits Committee of the Barnett Banks, Inc. Severance Pay Plan, NationsBank Corporation Corporate Benefits Committee, and NationsBank Benefits Appeal Committee,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

# PETITIONER'S REPLY TO RESPONDENTS' OPPOSITION FOR WRIT OF CERTIORARI

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## REASONS TO GRANT THE WRIT OF CERTIORARI

The Issue Presented was Properly Raised in the Eleventh Circuit.

The respondents on page 5 of their opposition fallaciously assert that petitioner, Loskill, never argued that a "violation of plan amendment procedures could create ERISA liability absent a showing of bad faith." This statement is simply untrue.

The issue presented herein was squarely set forth in Loskill's petition for rehearing and rehearing en banc in the Eleventh Circuit. Loskill's issue presented on page 8 of his rehearing petition was:

> Does the majority panel opinion directly conflict with the United States Supreme Court's holding in *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 85 (1995) which held that "whatever level of specificity a company ultimately chooses, in an amendment procedure or otherwise, it is bound to that level" and the Supreme Court's statement in *Inter-Modal Rail Employees Ass'n v. Atchison, Topeka and Santa Fe Ry. Co.*, 520 U.S. 510, 515-16 (1997) that an employer "must follow the formal procedures set forth in the plan" to validly alter it?

As set forth on pages 28 and 29 of Loskill's answer brief in the Eleventh Circuit, "Loskill's position before the trial court and on appeal was and is that a purported plan amendment to the Severance Pay Plan that is not approved and adopted by the Barnett Employees Benefits Committee is

defective and void. Under the plain language of the Severance Pay Plan, it could not be amended unless the following occurred: 'The [Barnett Employee Benefits] Committee will determine that an amendment is appropriate and will determine whether the amendment may significantly alter the cost of the Plan. The Committee or its agent will draft the amendment. Each amendment must be approved by a majority of the Committee members then in office.' Not one of these three separate requirements was met with respect to Resolution G [the release amendment]."

The trial court made an additional finding of bad faith on a *sua sponte* basis because Loskill's summary judgment argument on the invalidity of the amendment was not premised upon any finding of bad faith. Respondents' initial brief on page 28 in the Eleventh Circuit recognized Loskill's position and stated: "Loskill had never even argued – in his complaint, summary judgment motions, or any paper filed with the Court – that Barnett had acted in bad faith in adopting the Release Amendment. That subject was never addressed in the parties' papers." Respondents' reply brief on page 10 in the Eleventh Circuit asserted, "the District Court's *sua sponte* finding of bad faith – an issue which neither party briefed – was incorrect as a matter of fact and law." Later, in respondents' Eleventh Circuit reply brief on page 14, they state: "Loskill's only response on the bad faith issue is his claim that: '[t]he violations of the procedural requirements of the Barnett Severance Plan were so severe that Judge Nimmons' also made a *sua sponte* finding of bad faith.'"

Loskill's position in this litigation from the outset has been that "a purported plan amendment to the Severance Pay Plan that is not approved and adopted by the Barnett Employees Benefits Committee is defective and void." Thus, the issue presented in this petition was properly raised below.

The Eleventh Circuit is Alone in its Holding that "an amendment adopted in violation of the procedures set forth in a plan is invalid only upon a further showing of bad faith, active concealment, or detrimental reliance."

The respondents erroneously assert in sections II and III of their opposition that there is no conflict with this Court's opinions or any of the opinions of the United States Courts of Appeals, and on page 19 that the Eleventh Circuit is in "complete accord with the unanimous position of the lower courts." Even a cursory reading of the quotes from this Court's opinions in *Curtiss-Wright* and *Inter-Modal*, which were set forth in the issue presented in this petition, establish the conflict.

Furthermore, the relevant distinction concerning application of federal common law equitable principles found in the case law from the United States Courts of Appeals is all premised upon the situation where there is no plan procedure for amendment or there is a disclosure violation, and not where the amendment is purportedly adopted in the first place in violation of explicit plan procedures as expressly required by section 402(b)(3) of ERISA. Judge Roney in his dissent in *Loskill*, pointed to this distinction before he concluded: "As far as we have been able to determine, this is the first circuit court case that has held that an amendment adopted in violation of the procedures set forth in a plan is invalid only upon a further showing of bad faith, active concealment, or detrimental reliance." *Loskill*, 289 F.3d 734, 740 (11th Cir. 2002) (App. A at 12) (Roney, J. dissenting).

Respondents' attempt to distinguish the United States Courts of Appeals cases cited by Loskill do not succeed as the cases themselves discuss in separate sections the different situation of a purported amendment not adopted in

accordance with explicit plan procedures from situations where there is no plan procedure or where there is a disclosure violation. A prime example is the Third Circuit's opinion in *Ackerman v. Waranco, Inc.*, 55 F.3d 117, 122 (3rd Cir. 1995) where the issue of whether the proper entity approved the new plan provision was discussed and remanded entirely separate from the discussion and remand of the disclosure issue. The quote from *Ackerman* relied upon by respondents on page 17 of their opposition is found only in the section of the *Ackerman* opinion dealing with the disclosure issue. *Id.* at 124. *See also Murphy v. Keystone Steel & Wire Co.*, 61 F.3d 560, 568-69 (7th Cir. 1995), *affirming*, 850 F.Supp. 1367, 1380 (C.D. Ill. 1994) (distinguishing *Albedyll v. Wisconsin Porcelain Co. Revised Retirement Plan*, 947 F.2d 246 (7th Cir. 1991)).

Respectfully submitted,

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